Office Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-85

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DARCLY, INC., a California corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES, THE BUSINESS LICENSE COMMISSION OF THE COUNTY OF LOS ANGELES, THE LICENSE APPEALS BOARD OF THE COUNTY OF LOS ANGELES AND PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Is revocation of Petitioner's entertainment license resulting from the conviction of an employee for one incident of "obscene live conduct" an unconstitutional prior restraint on speech when the license is required for the commercial presentation of any act, play, scene, song, dance act, song and dance act or poetry recitation?

2. Is § 91.9(b)(1) of Los Angeles County Ordinance 5860 unconstitutional on its face and as applied herein because it permits revocation of an entertainment license without constitutionally required procedural safeguards and without requiring a judicial determination of obscenity in an adversary

proceeding in which the licensee is a party?

3. Is § 91.9(b)(1) of Los Angeles County Ordinance 5860 unconstitutional on its face because it permits revocation of an entertainment license for a single obscene performance by an employee without requiring it to be alleged or proved that the licensee was aware of, permitted, encouraged or caused any obscene acts?

4. Is revocation of Petitioner's public eating license an unconstitutional restraint on speech when predicated on grounds that will not support revocation of an entertainment license and which do not pertain to the service of food or drink?

II.

PARTIES TO THIS PROCEEDING

All parties to this proceeding are listed in the caption of this Petition.

IIIA.

TOPICAL INDEX

		Page
I.	QUESTIONS PRESENTED FOR REVIEW	i
II.	PARTIES TO THIS PROCEEDING	iii
IIIA.	TOPICAL INDEX	iv
IIIB.	TABLE OF AUTHORITIES	x
IV.	OPINIONS OF COURTS AND ADMINISTRATIVE AGENCIES BELOW	1
V.	THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED	1
VI.	THE ORDINANCES WHICH ARE INVOLVED IN THIS CASE	2
VII.	STATE OF THE CASE AND OF THE MATERIAL FACTS	10
VIII.	THE MANNER OF RAISING THE FEDERAL QUESTIONS IN THE STATE COURT	17

Page

IX. REASONS RELIED UPON FOR ISSUANCE OF THE WRIT 19

A. REVOCATION OF AN ENTERTAINMENT LICENSE BECAUSE AN EMPLOYEE OF THE LICENSEE WAS CONVICTED OF A SINGLE ACT OF OBSCENE LIVE CONDUCT AT THE LICENSED PREMISES IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH AS APPLIED. 19

B. SECTION 91.9 OF LOS ANGELES COUNTY ORDINANCE 5860 IS UNCONSTITUTIONAL ON ITS FACE IN THAT IT PERMITS IMPOSITION OF A PRIOR AND OVERLY BROAD RESTRAINT ON THE PRESENTATION OF LIVE ENTERTAINMENT PROTECTED BY THE FIRST AMENDMENT. 38

Page

C. SECTION 91.9(b)(1) OF LOS ANGELES COUNTY ORDINANCE 5860 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED HEREIN BECAUSE IT PERMITS REVOCATION OF AN ENTERTAINMENT LICENSE WITHOUT CONSTITUTIONALLY REQUIRED PROCEDURAL SAFEGUARDS. 43

D. SECTION 91.9 OF LOS ANGELES COUNTY ORDINANCE 5860 IS UNCONSTITUTIONAL ON ITS FACE IN THAT IT PERMITS REVOCATION OF APPELLANT'S LICENSE FOR A SINGLE ISOLATED ACT OF AN EMPLOYEE EVEN WHERE IT WAS NEITHER ALLEGED NOR PROVED THAT APPELLANT WAS AWARE OF, PERMITTED, ENCOURAGED OR CAUSED ANY UNLAWFUL ACTS. 50

Page

E. REVOCATION OF PETITIONER'S PUBLIC EATING LICENSE WAS AN UNCONSTITUTIONAL RESTRAINT ON SPEECH BECAUSE IT WAS PREDICATED ON GROUNDS THAT WILL NOT SUPPORT REVOCATION OF AN ENTERTAINMENT LICENSE AND WHICH DID NOT PERTAIN TO THE SERVICE OF FOOD OR DRINK. 52

CONCLUSION 61

APPENDIX I

OPINION, COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, FILED JANUARY 26, 1981

APPENDIX II

ORDER DENYING PETITION FOR REHEARING, COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DATED FEBRUARY 13,1981

APPENDIX III

ORDER DENYING PETITION FOR HEARING, CALIFORNIA SUPREME COURT, FILED APRIL 16, 1981

APPENDIX IV

ACCUSATION NO. 412, LOS ANGELES COUNTY BUSINESS LICENSE COMMISSION, DATED NOVEMBER 4, 1976

APPENDIX V

ORDER OF REVOCATION, LOS ANGELES COUNTY BUSINESS LICENSE COMMISSION, DATED FEBRUARY 7, 1977

APPENDIX VI

ORDER DENYING APPEAL, LOS ANGELES COUNTY LICENSE APPEAL BOARD, DATED DECEMBER 28, 1977

APPENDIX VII

PETITION FOR WRIT OF MANDATE AND FOR STAY ORDER, LOS ANGELES COUNTY SUPERIOR COURT, DATED JANUARY 6, 1978

APPENDIX VIII

JUDGMENT DENYING PETITION FOR WRIT OF MANDATE, LOS ANGELES COUNTY SUPERIOR COURT, FILED MAY 8, 1978

IIIB.

TABLE OF AUTHORITIES

Page

Cases

Alexander v. City of St. Paul
227 N.W.2d 370
(Minn., 1975) 30

Bantam Books, Inc. v.
Sullivan (1962)
372 U.S. 58,
83 S.Ct. 631,
9 L.Ed.2d 584 53-55

Brandenburg v. Ohio (1969)
395 U.S. 444 39

Butler v. Michigan (1956)
352 U.S. 380 39

Chase v. Davelaar
____ F.2d ____,
(9th Cir., May 18, 1981) 23

City of Seattle v. Bittner
(1973)
81 Wa.2d 747,
505 P.2d 126 32, 33

Dombrowski v. Pfister (1965)
380 U.S. 479 39

Page

Fehlhaber v. State of North Carolina (1978)
455 F.Supp. 130 — 26

Freedman v. Maryland (1965)
380 U.S. 51,
85 S.Ct. 734,
12 L.Ed.2d 649 — 27, 48

Gayety Theaters, Inc. v. State
259 So.2d 905,
(Fla. Ct. App., 1978) — 25

Genusa v. City of Peoria
619 F.2d 1203, (7th Cir., 1980) — 24

Gulf State Theaters, Inc. v. Richardson
287 S.2d 480, (La., 1973) — 25

N.A.A.C.P. v. Button (1963)
371 U.S. 415 — 39

Natco Theatres, Inc. v. Ratner
463 F.Supp. 1124,
(D.C., N.Y., 1979) — 24

People ex rel. Busch v. Projection Room Theater (1976)
17 Cal.3d 42,
130 Cal.Rptr. 328 — 34

People ex rel. Van de Kamp v. American Art Enterprises, Inc. (1977)
75 Cal.App.3d 523,
142 Cal.Rptr. 338 — 34

Page

Perrine v. Municipal Court (1971)
5 Cal.3d 656,
97 Cal.Rptr. 320 34-36

Pryor v. Municipal Court (1980)
25 Cal.3d 238 57

Schad v. Borough of Mount Ephraim
_____ U.S. _____
(June 1, 1981) 23, 39

Smith v. California (1959)
361 U.S. 147,
80 S.Ct. 15,
4 L.Ed.2d 205 50-52

Southeastern Productions, Ltd. v. Conrad (1975)
420 U.S. 546,
95 S.Ct. 1239,
43 L.Ed.2d 448 27, 44, 45

Spokane Arcades, Inc. v. Brockett
631 F.2d 735,
(9th Cir., 1980) 29

Universal Amusement Co. v. Vance
587 F.2d 159, (5th Cir.,
1978), aff'd. 444 U.S. 308 24, 26

Vance v. Universal Amusement Co. (1980)
100 S.Ct. 1156 26, 28, 29

Van Nuys Publishing Co. v. City of Thousand Oaks (1971)
5 Cal.3d 817,
97 Cal.Rptr. 777 43

Page

Yuclan Enterprises, Inc. v. Arne
488 F.Supp. 1145,
(D.C., Ha., 1980) 24

Statutes

California Code of Civil Procedure § 1094.5 11, 46

California Penal Code § 311.2 35

California Penal Code § 311.6 10

28 USCA § 1257(3) 2

Ordinances

Los Angeles County Ordinance 5860:

§ 13 40

§ 91.9 31, 38, 50

§ 91.9(b) 43

§ 91.9(b)(1) i, ii, 10, 43, 61

§ 92 57, 61

§ 92(b) 11, 57, 58

§ 92(c) 11, 57, 59

§ 92(e) 11, 57, 59

§ 92(f) 11, 57, 60

	Page
Los Angeles County Ordinance 5860 (continued):	
§ 92(j)	11, 57, 60
§ 92(k)	11, 57, 61
§ 651	53
§ 2802	19
§ 2810	19
§ 2860	41
§ 2874	41
§ 2876	41
§ 2878	41
§ 2879	41
§ 2881	42
§ 2883	42
§ 2885	42
§ 2886	42

IV.

OPINIONS OF COURTS AND ADMINISTRATIVE AGENCIES BELOW

1. An unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, issued January 27, 1981, is set forth in Appendix I.

V.

THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. On January 27, 1981, the Court of Appeal of the State of California, Second Appellate District, issued its opinion and order affirming the revocation of the licenses which is the subject of this Petition. (Appendix I.)

2. On February 13, 1981, the Court of Appeal denied a Petition for Rehearing therein. (Appendix II.)

3. On April 16, 1981, the Supreme Court of the State of California denied a Petition for Hearing therein. (Appendix III.)

4. The jurisdiction of this Court is invoked under 28 USCA § 1257(3).

VI.

THE ORDINANCES WHICH ARE INVOLVED IN THIS CASE

The relevant provisions of Los Angeles County Ordinance 5860 are as follows:

> "Article 1. Definitions
> "Sec. 2802. (9897 11-28-69) Entertainment.
>
> "Entertainment" as used in this chapter is defined to mean any act, play, review, pantonine, (sic) scene, song, dance act, song and dance act, or poetry recitation, conducted or participated in by any professional entertainer in or upon any premises to which the public

is admitted, or in any proprietary club. The term "professional entertainer" as used herein means a person or persons who engage for livelihood or gain in the presentation of entertainment.

"'Entertainment' also includes the exhibition of motion pictures as an incident to a public eating place or to premises which possess or which are required to possess a retailer's on-sale license as defined in § 23024 of the Business and Professions Code.

"'Entertainment' also includes a fashion or style show except when conducted by a bona fide non-profit club or organization, and when conducted solely as a fund raising activity for charitable purposes.

"'Entertainment' as used herein does not include:

(a) Mechanical music alone; or

(b) Instrumental music alone, except between the hours of 2:00 a.m., and 6:00 a.m., when the provisions of § 2861 shall apply; or

(c) Dancing participated in only by customers; however, this

subsection does not exempt exhibition dancing by a person receiving compensation for such exhibition dancing."

"Article 2. Licenses Required

"Sec. 2810. Entertainment Licenses.

(a) No person shall conduct, permit, or Assist in conducting or permitting any entertainment as defined in § 2802 to be shown, staged, exhibited, or produced in any premises to which the public is admitted, or in any proprietary club unless and until a written Class I Entertainment License has been obtained from the Tax Collector."

"Article 3. Suspension or Revocation.

"Sec. 2850. Revocation, Suspension or Modification.

A license required by this chapter shall be revoked, suspended, or modified as provided in § 91.9."

"Article 5. Public Eating Places.

"Sec. 651. Definition. Public Eating Place.

'Public Eating Place' means and includes every restaurant, lunch room, tea room, coffee

shop, soda fountain, public boarding house, hotel, club, beer parlor, cocktail lounge, and every other public place where food or drinks are prepared or served, or both, to be consumed by the public on the premises, and all kitchens, commissaries and other rooms appurtenant thereto, or connected therewith. All places where sandwiches, lunches, or similar food are prepared for sale or gift to the public, shall be classed as public eating places."

"Sec. 652. Public Eating Place.
License Required

Every person conducting, managing, or carrying on the business of a public eating place shall first procure a license and pay an annual license fee for each public eating place in the amount set forth in Chapter XXXI of this ordinance under the appropriate heading."

"Sec. 91.9 (10,545 8-11-72) Revocation or Suspension of License.
Activities Which May Involve Free Speech.

After a hearing as provided in Article 9 of Chapter 1 the

Commission may suspend or revoke a license for a bookstore, exhibition, traveling show, motion picture theatre, sound or advertising vehicle, model studio, picture arcade, entertainment as defined in Article I of Chapter XVII, Outdoor Festival or Growth Center if it finds that one or more of the following conditions exist:

(a) The building, structure, equipment or location of such business does not comply with or fails to meet all of the health, zoning, fire and safety requirements or standards of all the laws of the State of California or ordinances of the County of Los Angeles applicable to such business operation;

(b) The licensee, his employee, agent or manager has been convicted in a court of competent jurisdiction of:

1. Any violation of any statute, this, or any other ordinance arising from any act performed in the exercise of any rights granted by the license the revocation of which is under consideration, or

2. Any offense involving the maintenance of a nuisance caused by any act performed in the exercise of any rights

granted by the license the revocation of which is under consideration.

(c) The licensee, his employee, agent or manager has knowingly made any false, misleading, or fraudulent statement of material fact in the application for a license, or in any report or record required to be filed with the Tax Collector or Commission.

(d) Has violated any rule or regulation adopted by the Commission relating to the licensee's business.

(e) Failed or refused to notify the Tax Collector of any change in facts as required by section 86 within five days after such change. This section does not apply to a license for a security guard as provided for in section 3244." (Emphasis added.)

"Sec. 92. (10,217 3-26-71) Revocation or Suspension of License.

Activities Which Do Not Involve Free Speech.

After a hearing as provided in Article 9 of Chapter 1 the Commision may suspend or revoke a license, other than a license covered by section 91.9 but

including a license for a security guard as provided for in section 3244 if it finds that any licensee, his agent or employee or any person connected or associated with the licensee as partner, director, officer, stockholder, general manager, or person who is exercising managerial authority of or on behalf of the licensee has:

(a) Knowingly made any false, misleading or fraudulent statement of a material fact in an application for a license, or in any report or record required to be filed with any governmental agency; or

(b) Violated any provision of this or any other ordinance, or of any statute relating to his permitted activity; or

(c) Been convicted of a felony or any crime involving theft, embezzlement or moral turpitude; or

(d) Committed any act constituting dishonesty or fraud; or

(e) A bad moral character, intemperate habits, or a bad reputation for truth, honesty, or integrity; or

(f) Committed any unlawful, false, fraudulent deception or dangerous act while conducting a licensed business; or

(g) Published, uttered or dissemination (sic) any false, deceptive or misleading statements or advertisements in connection with the operation of a licensed business; or

(h) Violated any rule or regulation adopted by any governmental agency relating to the licensee's business; or

(i) Willfully failed to comply with the terms of any contract made as part of the exercise of the licensed business; or

(j) Conducted the licensed business in a manner contrary to the peace, health, safety, and the general welfare of the public; or

(k) Demonstrated that he is unfit to be trusted with the privileges granted by such a license; or

(l) Failed or refused to notify the Tax Collector of any change in facts as required by § 86 within five (5) days after such change." (Emphasis added.)

VII.

STATEMENT OF THE CASE AND OF THE MATERIAL FACTS

1. On or about November 4, 1976, an accusation was filed with Respondent BUSINESS LICENSE COMMISSION OF THE COUNTY OF LOS ANGELES seeking to revoke Petitioner's live entertainment and public eating license on the grounds that an employee had engaged in a performance at the licensed premises which resulted in her being convicted of a violation of § 311.6 of the California Penal Code (obscene live conduct). The accusation is set forth in Appendix IV.

2. The accusation sought revocation of the live entertainment license under § 91.9(b)(1) of Los Angeles County Ordinance 5860 and revocation of the

public eating license was sought under §§ 92(b), 92(c), 92(e), 92(f), 92(j) and 92(k) of the same ordinance.

3. On February 2, 1977, following a contested hearing, the BUSINESS LICENSE COMMISSION OF THE COUNTY OF LOS ANGELES revoked the live entertainment license and public eating license of Petitioner DARCLY, INC. The decision revoking the license is set forth in Appendix V.

4. Subsequent to the revocation, DARCLY, INC. timely filed an appeal with the License Appeals Board of the County of Los Angeles. The appeal was denied without a hearing or opinion on December 28, 1977. (Appendix VI.)

5. On January 17, 1978, DARCLY, INC. filed a Petition for Writ of Mandamus pursuant to California Code of Civil Procedure § 1094.5 in the Superior Court

of the County of Los Angeles, which stayed the order of revocation of each such license pending a hearing. A copy of the Petition for Writ of Mandamus is set forth in Appendix VII.

6. On May 8, 1978, after a hearing, the Superior Court of the County of Los Angeles denied the Petition and vacated its stay. The findings and judgment of the Superior Court are set forth in Appendix VIII.

7. DARCLY, INC. timely filed a Notice of Appeal to the California Court of Appeal from denial of the Petition for Mandamus.

8. On January 26, 1981, in an unpublished opinion, the California Court of Appeal affirmed the denial of the Petition for Mandamus by the Superior Court of the County of Los

Angeles in the above-mentioned action for mandamus. (Appendix I.)

9. On April 16, 1981, the California Supreme Court denied DARCLY, INC.'s petition for hearing from the decision of the Court of Appeal. (Appendix III.)

The facts recited herein refer to the evidence taken at a hearing before the Business License Commission on January 12, 1971. Page references are to the record in the Court of Appeal.

Russell L. Petrie, a Deputy Sheriff, was called to testify regarding the facts alleged in the accusation. He testified as follows:

On February 27, 1976, Deputy Petrie went to the licensed premises at about 6:00 p.m. in the company of Deputy Briggs. They each paid a $1.00

admission fee at the ticket booth before entering. (Cl. Tr. pg. 40.)

The premises had a bar on the eastern side. A raised platform along the north wall was lit by spotlights. (Cl. Tr. pg. 41.) There was a performance on the stage when he entered and sat at a table adjacent to the stage. (Cl. Tr. pg. 45.) One of the performers was DEBORAH BEAUFORD who came on the stage wearing a bra and bikini bottom. (Cl. Tr. pg. 45.) About two rows of customers were seated between the Deputy and the stage. (Cl. Tr. pgs. 53-54.) The entire performance by MISS BEAUFORD lasted between 15 to 20 minutes. (Cl. Tr. pg. 58.)

During the first dance, BEAUFORD took off her bikini bottom, and lay on the stage with her legs extended over her

head, exposing her vagina. Her hands were on her thighs; she moved her hands in such a way that the lips of her vagina opened and closed. (Cl. Tr. pg. 46.) She did not touch her vagina, however. (Cl. Tr. pg. 55.) After the first song, she removed the rest of her costume. She got in a position where she had her back to the stage, supporting herself with her hands and feet. On one occasion she placed her legs on a customer's shoulders, and gyrated her pelvis in front of him for a short time. (Cl. Tr. pg. 46.) During the third dance, she squatted and again caused the lips of her vagina to move, but did not touch them. (Cl. Tr. pgs. 47, 55.) Following her performance, BEAUFORD put on her frilly top and bikini bottom. At one time thereafter

she stood with her buttocks near a patrons crotch and gyrated her hips for a few seconds. (Cl. Tr. pgs. 48, 58, 59.)

The manager, a man by the name of JOHANSEN, was observed in the bar and in the office. He directed the employees and after BEAUFORD's arrest, stated he was the manager. (Cl. Tr. pg. 51.) Generally he was behind the Deputy who was unable to say whether JOHANSEN was watching MISS BEAUFORD when she placed her legs on the customer's shoulders or squatted on the stage. (Cl. Tr. pgs. 60-61.)

The docket of the Municipal Court in People v. Beauford and Johansen was admitted into evidence. (Cl. Tr. pg. 33.) It reflected that on October 6, 1976, the defendants therein submitted

the case for trial on the police report and stipulated that a Sargent Nottingham be deemed to testify as an expert to the obscenity of the performance. Thereupon BEAUFORD was found guilty, placed on two years' summary probation and fined $250.00. The complaint against JOHANSEN was dismissed in the interests of justice. (Cl. Tr. pgs. 131-133.)

VIII.

THE MANNER OF RAISING THE FEDERAL QUESTIONS IN THE STATE COURT

1. The federal questions were initially raised at the administrative hearing and then in the court of first instance in paragraph 14 of the Petition for Writ of Mandate filed on January 17, 1979, in the Superior Court of the State of California for the County of Los

Angeles (Appendix VI) and by written argument filed with the court.

2. The federal questions were pursued by written brief in the Court of Appeal and the Supreme Court of California in substantially the same form as appear herein. The Court of Appeal disposed of the federal constitutional questions at pages 3-5 of its unpublished opinion. (Appendix I.)

IX.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT

A.

REVOCATION OF AN ENTERTAINMENT LICENSE BECAUSE AN EMPLOYEE OF THE LICENSEE WAS CONVICTED OF A SINGLE ACT OF OBSCENE LIVE CONDUCT AT THE LICENSED PREMISES IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH AS APPLIED.

Under §§ 2802 and 2810 of Los Angeles County Ordinance 5860 (hereinafter referred to as "L.A.C.O. 5860") an entertainment license is required for the public presentation of any act, play, review, pantomime, scene, song, dance act, song and dance act or poetry recitation. Thus, there is no question that revocation of an entertainment license is a prior restraint on speech, since without such a permit one cannot publicly present any play or other

performance for which a license is required. Under the circumstances of this case, revocation of Petitioner's license imposes a restraint on speech which violates the First Amendment to the Constitution.

If revocation under the facts presented in this case is proper, the rights of free speech guaranteed by the First Amendment can be reduced to mere privileges which are subject to forfeiture. If revocation in this case is constitutional then there is nothing to stop a city from licensing sale or distribution of newspapers and making such a license revocable for violation of obscenity, libel or other laws regulating content of the publication.

There are no published cases in the State of California dealing with the

questions raised in this petition. Notwithstanding the constitutional importance of these issues and the absence of any reported authority in this State, the Court of Appeal decided the matter in an unpublished opinion of slightly more than four pages.

Although the above issues have not been addressed in any published opinions in California, published, decisions of federal courts and of courts in other states have reached contrary results. Courts in this state and other states have also reached contrary results in public nuisance and injunction cases involving identical substantive and procedural issues. The Court of Appeal did not address these cases or attempt to explain why the constitutional rights of a licensee who has neither been

accused of nor found to have conducted a public nuisance should be entitled to less protection than the rights of one who has been so accused or convicted.

Finally, this case involves important constitutional questions relating to the revocation of the public eating license issued to Petitioner on grounds arising out of the same incident.

It is now clearly established that the activities encompassed within the definition of entertainment required to be licensed by the County of Los Angeles are protected speech under the First Amendment. As this Court recently held:

> "By excluding live entertainment throughout the borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. Entertainment, as

> well as political and ideological speech is protected; motion pictures, programs broadcast by radio and television and live entertainment such as musical and dramatic works, fall within the First Amendment guarantee." Schad v. Borough of Mount Ephraim, (June 1, 1981) ____ U.S. ____.

Even nude dancing is entitled to some protection under the First Amendment. Schad v. Borough of Mount Ephraim, supra, Chase v. Davelaar, (9th Cir., May 18, 1981) ____ F.2d ____. When an ordinance relating generally to live entertainment is applied to nude dancing, as it was in the instant case, constitutional challenge may be based upon the impact of the ordinance against the expressive activities of others subject to the same regulation, Schad v. Borough of Mount Ephraim, supra.

Lower federal courts have recognized that ordinances which permit denial or revocation of an entertainment or theater license as a result of prior offenses or convictions violate the First Amendment's prohibition against prior restraints. Genusa v. City of Peoria, (7th Cir., 1980) 619 F.2d 1203; Universal Amusement v. Vance, (5th Cir., 1978) 587 F.2d 159, aff'd 444 U.S. 308; Natco Theatres, Inc. v. Ratner, (D.C., N.Y., 1979) 463 F.Supp. 1124; Yuclan Enterprises, Inc. v. Arne, (D.C., Ha., 1980) 488 F.Supp. 1145.

The same principle has been recognized in cases where exhibition or sale of obscene materials has been enjoined as a public nuisance. Those cases are applicable since the purpose and effect of the injunction would have been to

close down a theater or bookstore which had sold or exhibited obscene matter and the purpose and effect of the revocation herein is to terminate the right to present live entertainment because of the conviction of an employee for obscene live conduct.

In Gulf State Theaters, Inc. v. Richardson, (La., 1973) 287 So.2d 480, the Louisiana Supreme Court held that an order closing a movie theater for one year as a public nuisance because obscene films had been shown was the very essence of prior restraint because it prohibited all expression at the premises. In Gayety Theaters, Inc. v. State, (Fla., Ct. App. 1978) 259 So.2d 905, the Court upheld a court order restraining exhibition of a film which had been found to be obscene but reversed as

a prior restraint an order prohibiting showing of any "X-rated" film. The same result was reached by a district court in Fehlhaber v. State of North Carolina, (1978) 455 F. Supp. 130.

The authority of the public nuisance cases has been reasserted by the Supreme Court in Vance v. Universal Amusement Co., (1980) 100 S.Ct. 1156, which affirms Universal Amusement Co. v. Vance, (5th Cir., 1978) 587 F.2d 159. Vance was concerned with the facial constitutionality of two nuisance statutes, one of which expressly authorized the use of an injunction to prohibit exhibition of obscene material. A majority of the Fifth Circuit had held that the nuisance statute was unconstitutional because it would allow issuance of an injunction against future

exhibition of unnamed films. The dissent in the Fifth Circuit had argued that such a restraint was no greater than would be imposed by enforcement of penal statutes against obscenity. The Supreme Court rejected the dissenter's arguments and affirmed.

The Court held that the statutes lacked the necessary procedural safeguards established by Freedman v. Maryland, (1965) 380 U.S. 51, 85 S.Ct. 734, 12 L.Ed.2d 649, and Southeastern Productions Ltd. v. Conrad, (1975) 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448. (See argument below.) Specifically, the Court rejected the argument that the Texas statute was distinguishable because the initial restraint was imposed by a judge rather than an administrative

censor. The court re-emphasized in footnote 13 at 100 S.Ct. 1161 that:

> "The presumption against prior restraints is heavier--and the degree of protection broader--then that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse the rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable."

The statute held unconstitutional in Vance v. Universal Amusement Co., supra, was one that had a more narrow impact than does revocation of a license; it would not have terminated exhibition of all films but would have merely enjoined exhibition of obscene films as a class,

while not otherwise purporting to restrict the exercise of First Amendment rights. The statute was held unconstitutional to prevent obliteration of the "dim line" separating protected from unprotected speech. The protection of that "dim line" requires prohibition of prior restraints in all but the most extreme cases. The power to license business and to restrain nusiances comes from the same police power. It is inconceivable that the principles recognized in public nuisance cases could be avoided by the simple expedient of requiring a license and then revoking it.

In Spokane Arcades, Inc. v. Brockett, (9th Cir., 1980) 631 F.2d 735, the Court applied Vance v. Universal Amusement Co. to hold unconstitutional a statute of

the State of Washington permitting abatement as a public nusiance of the sale or exhibition of obscene materials. The Court found that a preliminary injunction which operated to prevent future exhibition of unnamed films was an invalid prior restraint. It also held invalid a portion of the statute authorizing closure of the business against use for any purpose because of prior sale, distribution or exhibition of obscene materials, although it reserved judgment as to whether a closure order might be proper following a procedure that conformed in all respects to the First Amendment.

A number of cases in other states have held that revocation of a theater license because of an obscenity conviction is a prior restraint.

In Alexander v. City of St. Paul, (Minn., 1975) 227 N.W.2d 370, the Minnesota Supreme Court invalidated an order revoking a license to operate a motion picture theater based on the plea of guilty of an employee to the crime of exhibiting an obscene motion picture. The ordinance in question was more narrowly drawn than § 91.9 since it was limited to revocations for conviction of an obscenity statute. The Minnesota Supreme Court held the ordinance unconstitutional on its face because there was no showing that revocation was necessary to avoid a clear and present danger of a substantive evil and because "it is impossible under such a scheme to ensure that only obscene films will be suppressed in the future".

In City of Seattle v. Bittner, (1973) 81 Wash.2d 747, 505 P.2d 126, renewal of a motion picture theater license had been denied because an officer of the licensee had been convicted of exhibiting obscene films. In order to avoid the argument that it was engaging in a prior restraint, the city argued that license revocation was a punishment for past offenses. The Washington Supreme Court held, however, that the ordinance was facially unconstitutional whether viewed as punishment or as deterrent:

> "The appellant [City of Seattle] does not advise us of the source of its authority to use its licensing power as a vehicle for the imposition of criminal penalties, much less to use that power to punish an applicant for a second time for past offenses . . ..
>
> But we need not consider the propriety of the use of the licensing power as punishment.

> What the appellant labels 'punishment' is in fact an attempted prior restraint upon the exercise of a constitutional freedom.
>
> The appellant has apparently proceeded upon the assumption that a person who has been convicted of the offense of exhibiting an obscene movie, under RCW 9.68.010, is more likely than not to commit the offense again. This must mean that, in its opinion, the imposition of penalties under the criminal law has neither a deterrent nor a rehabilitative effect, and further that the penalties prescribed are not adequate punishment for the offense. Whether or not this assumption has any validity, we are convinced that the constitution does not permit a licensing agency to deny to any citizen the right to exercise one of his fundamental freedoms on the ground that he has abused that freedom in the past. No case is cited which supports such a proposition and our research has revealed none."
>
> City of Seattle v. Bittner, 505 P.2d at pg. 131.

California has recognized and applied the foregoing principles in cases

involving license denials. Perrine v. Municipal Court, (1971) 5 Cal.3d 656, 97 Cal.Rptr. 320, and public nuisance injunctions. People ex rel. Busch v. Projection Room Theater, (1976) 17 Cal.3d 42, 59, 130 Cal.Rptr. 328; People ex rel. Van de Kamp v. American Art Enterprises, Inc., (1977) 75 Cal.App.3d 523, 531, 142 Cal.Rptr. 338. The courts below have failed to effectively explain how the instant case is distinguishable from these authorities.

What, after all, can it mean to revoke a license on grounds that would not sustain denial of a replacement license in the first place. Considerations of prior restraint aside, it seems clear under California and federal law that Petitioner could not now be denied a new license merely because of its employee's

conviction. To permit revocation of the existing is a patent absurdity.

The opinion of the California Court of Appeal in the instant case said that the denial of the license in Perrine was based upon conduct of the applicant not necessarily related to th selling of books, or in furtherance of his licensed business. Such interpretation is incomplete and inaccurate. Although the ordinance that was held unconstitutional in Perrine was not limited on its face to crimes related to the license being sought, the applicant in that case had in fact been twice convicted of selling obscene materials in violation of § 311.2 of the Penal Code and it was argued in Perrine that the ordinance should be narrowly construed to permit denial of the license under such

circumstances. The California Supreme Court expressly rejected that contention because the ordinance would violate the First Amendment if so construed. Perrine v. Municipal Court, supra, 5 Cal.3d at 654-665, 97 Cal.Rptr. 325.

The Court of Appeal also distinguished Perrine on the grounds that bookstores are entitled to greater First Amendment protection than nude entertainment. Whether or not such a distinction may be made in other contexts, it is wholly irrelevant to this case. The license which was revoked was not merely a nude dancing license but applied generally to all forms of live entertainment, including the production of plays and ballets and in some cases the exhibition of moving pictures. Thus, revocation foreclosed not merely the

right to present nude entertainment but the right to present all forms of entertainment covered by the license.

If the rule against prior restraints means anything, it means that no license to exercise First Amendment rights may be revoked, nor may such right be forfeited on the ground that on one isolated occasion the license or his employee violated an obscenity law, absent allegation and proof that revocation is necessary to prevent a clear and present danger.

B.

SECTION 91.9 OF LOS ANGELES COUNTY ORDINANCE 5860 IS UNCONSTITUTIONAL ON ITS FACE IN THAT IT PERMITS IMPOSITION OF A PRIOR AND OVERLY BROAD RESTRAINT ON THE PRESENTATION OF LIVE ENTERTAINMENT PROTECTED BY THE FIRST AMENDMENT.

The foregoing argument was based on the proposition that revocation of Petitioner's live entertainment license was unconstitutional as applied to the facts and circumstances of this case. The instant argument is directed to the facial unconstitutionality of the ordinance authorizing revocation, and is not limited to the specific facts in this case. The basic authority for this proposition lies in the cases cited in the foregoing section of this petition.

A law which fails to protect First Amendment rights should not merely be

declared unconstitutional as applied in protected situations, but should be declared unconstitutional on its face as an antidote to the chilling effect on the exercise of such rights caused by the mere existence of the law. Schad v. Borough of Mount Ephraim, supra, U.S. _____; Brandenburg v. Ohio, 395 U.S. 444 (1969); Dombrowski v. Pfister, supra, 380 U.S. 479 (1965); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Butler v. Michigan, 352 U.S. 380 (1956).

Although the instant case arose out of a conviction of a performer for engaging in obscene live conduct, the ordinance is much broader than its application in the instant case. It permits revocation of an entertainment license if:

> "(b) The licensee, his employee, agent or manager has been

convicted in a court of competent jurisdiction of:

> 1. Any violation of any statute, this, or any other ordinance arising from any act performed in the exercise of any rights granted by the license the revocation of which is under consideration, . . ."

Thus, the revocation of the license is not limited to conviction of a crime involving obscenity, but would apply to any crime committed during the presentation of licensed entertainment, such as if one performer were to commit a battery upon another or were to be under the influence of a proscribed drug. Moreover, revocation can also be based upon a conviction of a violation of some part of the licensing ordinance itself. (Such a violation is made a misdemeanor by § 13 of L.A.C.O. 5860.) The following general regulations are

contained in the Los Angeles County Entertainment License Ordinance, and conviction of violation of any of them could lead to revocation of a license.

1. Sec. 2860 requires the license to be posted in a conspicuous place at all times.

2. Sec. 2874 makes it unlawful to permit any intoxicated person to be or remain on the premises.

3. Sec. 2876 requires that the entertainment not be visible from the street.

4. Sec. 2878 prohibits any gambling on the premises.

5. Sec. 2879 prohibits solicitation of trade near the entrance by personal solicitation or by means of any voice amplification.

6. Sec. 2881 requires minimum lighting to be maintained except when the show is in progress.

7. Sec. 2883 establishes a minimum number of required employees during the time entertainment is presented.

8. Sec. 2885 prohibits conversations between entertainers and customers.

9. Sec. 2886 requires the entertainment to be presented on a stage or platform raised at least 18 inches off the floor.

Some of the above-referenced ordinances undoubtedly have a valid purpose, but that is not the point here. Imagine an ordinance licensing the home delivery of newspapers that was subject to revocation if a driver of a delivery truck were convicted of violating a traffic law. Traffic laws have a valid purpose

and are essential to public safety, but it is inconceivable that a single violation of a traffic law, even one so serious as vehicular manslaughter, could result in the forfeiture of a newspaper's right to home distribution. See Van Nuys Publishing Co. v. City of Thousand Oaks, (1971) 5 Cal.3d 817, 97 Cal.Rptr. 777.

For these reasons, L.A.C.O. § 91.9(b) is unconstitutional on its face.

C.

SECTION 91.9(b)(1) OF LOS ANGELES COUNTY ORDINANCE 5860 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED HEREIN BECAUSE IT PERMITS REVOCATION OF AN ENTERTAINMENT LICENSE WITHOUT CONSTITUTIONALLY REQUIRED PROCEDURAL SAFEGUARDS.

Although prior restraints are not unconstitutional per se, there is a heavier presumption against and a

broader degree of protection from prior restraints than is imposed on subsequent criminal penalties.

> "Behind the distinction is a theory deeply etched in our law: A free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." Southeastern Productions, Ltd. v. Conrad, (1975) 420 U.S. 546, 559, 95 S.Ct. 1239, 1246-1247.

In Southeastern Productions, Ltd., the Court was addressing an action for permanent injunction to permit use of a city auditorium by a musical promoter. The promoter brought the action after a municipal board had rejected his application to present the rock musical "Hair" on the basis of outside reports

from which it concluded that the production was not in the community's best interests. The Court held:

> "A system of prior restraint runs afoul of the First Amendment if it lacks certain safe guards: First, the burden of instituting judicial proceedings, and of proving that the matter is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purposes of preserving the status quo. Third, a prompt final judicial determination must be assured." Southeastern Productions, Ltd. v. Conrad, supra, 420 U.S. at 560.

In the case at bar, the license revocation effects an unconstitutional prior restraint, as discussed above, but the procedure authorized by the subject ordinance also fails to meet constitutionally required safeguards which are

designed to obviate the dangers of a censorship system.

First, under L.A.C.O. 5860, the licensing commission does not have any burden of instituting any judicial proceeding and, therefore, also has no burden of proof in such a proceeding. The ordinance simply empowers the commission to revoke a license after holding its own hearing. A judicial proceeding to review the constitutionality of revocation is only held if the licensee rather than the commission, applies to the court for a writ of mandate. Cal. Code Civ. Proc. § 1094.5. Thus, the licensee rather than the government has the burden of proof. It is clear that this procedure fails to meet constitutional standards.

The absence of procedural safeguards is particularly acute in view of the Commission's apparently untrammeled discretion to impose revocation or any lesser penalty. The Court of Appeal said, in respect to Appellant's argument that the ordinance is unconstitutional because it vests such uncontrolled discretion:

> "All the use of the word 'may' does is to authorize the Commission to exercise some degree of liberality and to elect, rather than a full revocation, some lesser restriction such a probation, or a short term of suspension. Petitioner cannot hereby complain that the Commission failed to give it such lesser penalty for its misconduct." (Opinion, Appendix I, page 7.)

The Court of Appeal apparently accepted the proposition that the choice of penalty cannot be overturned except for a clear abuse of discretion.

Application of that general principal in this type of case renders the licensing ordinance invalid under Freedman v. Maryland, supra, 380 U.S. 51, 85 S.Ct. 734, since such a standard of review is inconsistent with the requirement that the Commission bear the burden of seeking and obtaining judicial review. Even if the revocation ordinance were otherwise constitutional, the order of the administrative agency must be subject to judicial review to guarantee that any restraint on freedom of speech be no greater than is essential to further the governmental interest served by the licensing ordinance.

Turning to the instant case, the only evidence introduced pertained to the single incident which was the subject of the accusation. It was never alleged or

proved that any other incidents of illegal conduct had occurred at the licensed premise nor was it alleged or proved that revocation was the least restrictive way to protect the public. Indeed, the docket sheet introduced into evidence showed that the criminal prosecution of the manager of the premises had been dismissed. It also showed that as a condition of probation DEBORAH BEAUFORD had been ordered not to work as a nude dancer or performer. It surely follows that the record fails to show that the condition of probation on the offender herself is insufficient to protect the public and fails to demonstrate that the greater restraint of revocation is necessary.

D.

SECTION 91.9 OF LOS ANGELES COUNTY ORDINANCE 5860 IS UNCONSTITUTIONAL ON ITS FACE IN THAT IT PERMITS REVOCATION OF APPELLANT'S LICENSE FOR A SINGLE ISOLATED ACT OF AN EMPLOYEE EVEN WHERE IT WAS NEITHER ALLEGED NOR PROVED THAT APPELLANT WAS AWARE OF, PERMITTED, ENCOURAGED OR CAUSED ANY UNLAWFUL ACTS.

In Smith v. California, (1959) 361 U.S. 147, 80 S.Ct. 15, 4 L.Ed.2d 205, the court held unconstitutional, an ordinance that imposed liability on a bookseller for sale of an obscene book with no requirements of proving his knowledge of the contents of the book. The Court stated that:

> " We think this ordinance's strict liability feature would tend seriously to have [the] effect [of recognizing state power to restrict dissemination of books which are not obscene], by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold . . ..

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally-protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." 361 U.S. at 152-153.

Although Smith involved a different form of expression than is addressed herein, the legal and constitutional issue is the same. As in Smith, the ordinance herein effects strict liability in that Petitioner's license is revocable for the acts of its employee, and said strict liability imposes a penalty as well as a restraint

upon Petitioner's First and Fourteenth Amendment rights.

The ordinance in question herein makes no provision for any scienter requirement on the part of the licensee. As in Smith v. California, supra, this imposition of strict liability inhibits constitutionally protected expression, and therefore, cannot stand.

E.

REVOCATION OF PETITIONER'S PUBLIC EATING LICENSE WAS AN UNCONSTITUTIONAL RESTRAINT ON SPEECH BECAUSE IT WAS PREDICATED ON GROUNDS THAT WILL NOT SUPPORT REVOCATION OF AN ENTERTAINMENT LICENSE AND WHICH DID NOT PERTAIN TO THE SERVICE OF FOOD OR DRINK.

The revocation in these proceedings of Petitioner's public eating license (which authorized operation of a restaurant, beer parlor, cocktail lounge and

every other public place where food or drinks are prepared or served or both for consumption on the premises, Ordinance 5860, § 651) is subject to the same constitutional standards as revocation of the entertainment license, since it was equally predicated on the alleged obscene performance by Petitioner's employee. The Constitution protects speech from indirect as well as direct suppression. Bantam Books, Inc. v. Sullivan, (1962) 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed. 2d 584.

Bantam Books involved blacklisting by a state Commission of publications which the Commission felt were objectionable for distribution to youths under 18 years of age. It was contended that constitutional safeguards required in the regulation of obscenity did not

apply to activities of the Commission because it did not regulate or suppress obscenity but simply exhorted booksellers and advised them of their legal rights. The Court rejected this contention and held the Commission's actions to be an unconstitutional prior restraint violative of the First and Fourteenth Amendments.

Like Bantam, the Commission's action revoking Petitioner's public eating license directly and designedly discourages and punishes the entertainment and serves as an instrument of regulation independent of the laws against obscenity. In Bantam Books, the Court stated:

> "Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making

> such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." 372 U.S. at 69-70.

Indirectly censoring Petitioner by depriving it of other licenses needed to stay in business is no less repugnant to the Constitution than direct revocation of its entertainment license.

The Court of Appeal, in its opinion in this case, held that revocation of

the public eating license was supported by evidence that Petitioner's employee engaged in obscene conduct while acting as a waitress. Such an assertion goes beyond any argument advanced by the County in support of the revocation and is unsupported bv the record.

The accusation alleged that Ms. Beauford was observed to approach a customer standing near the bar, back into his crotch and gyrate her buttocks. (Ct. Tr. pg. 86.) The testimony showed that Ms. Beauford was dressed at the time in bikini bottoms and a lace top and that the activity lasted but a few seconds. (Cl. Tr. pg. 48, lines 1-6; pg. 59, line 14; pg. 60, line 6.) There was no evidence of physical contact between the customer and Ms. Beauford during those few seconds. Such evidence falls far

short of establishing obscene or lewd conduct under state law and fails wholly to establish any grounds for revocation of a public eating license under § 92 of the Los Angeles County Licensing Ordinance. (App. Op. Br. pgs. 8-9.) See Pryor v. Municipal Court, (1980) 25 Cal.3d 238.

The Commission herein, without further specifying its findings, found the accusation to be true and revoked Petitioner's public eating license pursuant to § 92, Subsections (b), (c), (e), (f), (j) and (k) of Ordinance 5860. The accusation, which was narrative in form, did not purport to make any allegation of fact or of legal conclusion, and did not indicate which of the various aspects of the narrative were intended to relate to each of the

sections pursuant to which the Commission revoked Petitioner's license. Regardless of the Commission's failure to sufficiently specify its findings, the facts alleged in the accusation do not support the revocation of Appellant's license under the sections listed by the Commission.

Section 92(b) of L.A.C.O. 5860 permits suspension or revocation of a public eating license if an employee of a licensee has "violated any provision of this or any ordinance or of any statute relating to his permitted activity". The accusation fails to disclose any facts or legal conclusions that might indicate that the above described conduct of DEBORAH BEAUFORD was related to the permitted activity, to wit: serving food or beverages for consumption on the

premises, or that it violated any statute or ordinance.

Section 92(c) permits suspension or revocation upon a conviction of "a felony or any crime involving theft, embezzlement or moral turpitude". There is no allegation in the accusation that Miss Beauford was convicted of a crime that fell into any of the listed categories with respect to the above described conduct.

Section 92(e) permits suspension or revocation if the Commission finds that any employee of a licensee has "a bad moral character, intemperate habits, or a bad reputation for truth, honesty or integrity". Nothing in the accusation purports to connect the facts narrated therein to any of the matters listed in subsection (3) (assuming that due

process permits a public eating license to be revoked solely because the licensee has had the temerity to employ a waitress with intemperate habits.)

Section 92(f) applies where the employee has "committed any unlawful, false, fradulent deception or dangerous act while conducting a licensed business". Since Miss Beauford was not the person in charge of the premises, no allegation discloses in what manner Miss Beauford was "conducting the business" at the time of her performance or subsequent act. The same deficiency exists with respect to § 92(j), which applies if the employee "conducted the licensed business in a manner contrary to the peace, health, safety and the general welfare of the public".

Section 92(k) applies if the licensee's employee has "demonstrated that he is unfit to be trusted with the privileges granted by such a license". Apart from the transparent vagueness of the section, nothing in the accusation deals with this section or the problems engendered by the fact that Deborah Beauford was not a licensed person and thus not a holder of any "privileges" granted thereby.

Thus, the record in this case does not support revocation of Appellant's public eating license under § 92 of L.A.C.O. 5860.

CONCLUSION

L.A.C.O. 5860, § 91.9(b)(1) is constitutionally defective both on its face and as applied herein for several

reasons: The scope of said Ordinance is unconstitutionally overbroad in that it permits license revocation even in cases, as herein, where the First and Fourteenth Amendments guarantee protection. The Ordinance effectuates a prior restraint that is defective substantively and procedurally. The Ordinance fails to observe constitutional limitations that require an order to be directed at particular material which has been adjudged obscene following a fair and full adversary hearing. Procedurally, the prior restraint fails to meet any of the constitutionally required safeguards which have been imposed to prevent violation of the First and Fourteenth Amendments. In addition to that procedural defect, the Ordinance unconstitutionally allows

revocation without a judicial determination of obscenity in an adversary proceeding to which Petitioner is a party, and imposes strict liability without requiring scienter.

Revocation of Petitioner's public eating license imposed an indirect restraint upon Petitioner's First and Fourteenth Amendment rights and, as such, is defective for the same reasons that revocation of the entertainment license is defective.

Thus, certiorari should be granted, the order of the lower court should be reversed and this Court should order the California court to issue a writ of mandate directing Respondents to reinstate

and reissue Petitioner's entertainment and public eating licenses.

Respectfully submitted,

QUAN, COHEN, KURAHASHI, HSIEH & SCHOLTZ

By: KENNETH P. SCHOLTZ

Attorneys for Petitioner

APPENDIX I

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DARCLY, INC., et al.,

Petitioner and Appellant,

v.

COUNTY OF LOS ANGELES, et al.,

Respondents.

---

2 Civ No. 54088

(Super. Ct. No. C 226 906)

FILED: January 26, 1981
Clay Robbins, Jr., Clerk

APPEAL from a judgment of the Superior Court, Los Angeles County. George M. Dell, Judge. Affirmed.

Quan, Cohen, Kurahashi, Hsieh & Scholtz, and Kenneth P. Scholtz for Petitioner and Appellant.

John H. Larson, County Counsel, and Patrick T. Meyers, Deputy County Counsel, for Respondents.

Petitioner appeals from a judgment denying it a writ of mandate to reverse a decision of respondent License Appeals Board, revoking its Entertainment and Public Eating licenses. We affirm the judgment.

Petitioner operated an establishment in the County of Los Angeles, in which, in addition to serving food and drink, it presented live entertainment. One of its employees was convicted of a violation of section 311.6 of the Penal Code -- obscene conduct in a public place.

Her conviction was sustained on appeal (People v. Beauford (1977) 79 Cal.App.3d Supp. 1).

I

That the statute under which Ms. Beauford was convicted was a constitutional provision under the police power can hardly be questioned. We need not here set forth the testimony as to her conduct. Under no theory was it the kind of protected expression that cannot be restrained; it was, by any standard, the most extreme of lewd and obscene conduct imaginable. The constitutionality of that statute was fully discussed in the opinion sustaining Ms. Beauford's conviction. We need not repeat that analysis here.

II

Petitioner contends, however, that it was unconstitutional to revoke his licenses because an employee was convicted in a proceeding to which he was not a party. That contention is frivolous. Petitioner was given notice and a hearing at which the Business License Commission took evidence -- evidence fully supporting the charge. Petitioner offered no cross-examination or defense, other than to state that Ms. Beauford's conviction was then on appeal. After the Commission entered its order of revocation, petitioner appealed to the License Appeals Board, which sustained the order.

It is apparent that petitioner had a full opportunity, which it did not use, to litigate, before the administrative

agencies, the issue of lewd and obscene conduct. Due process requires no more.

III

As we understand its position, petitioner contends that revocation of its licenses is an act of censorship in that it operates to prevent it from hereafter conducting its business in a lawful manner. In that contention, petitioner relies on Perrine v. Municipal Court (1971) 5 Cal.3d 656. Perrine is not here in point. Not only did it involve the sale of books, a field entitled to greater protection than nude entertainment, but it involved an application for, rather than a revocation of, a license. The opinion carefully explains that the denial therein involved was based on conduct of the applicant not

necessarily related to the business of book selling. Here all that petitioner has been subjected to is the revocation of its present license for conduct proved to have been done in furtherance of his licensed business. Perrine's prescription against denial of a license for criminality unrelated to the business involved has no application to the case at bench.

IV

The ordinance under which the administrative agencies acted provides that a license "may" be revoked on the grounds therein set forth. Petitioner contends that the use of the word "may" granted to the Commission an illegal power to act without statutory standards. We reject that contention. Clearly the

ordinance set forth standards for revocation that are constitutionally adequate. All the use of the word "may" does is to authorize the Commission to exercise some degree of liberality and to elect, rather than a full revocation, some lesser restriction such as probation, or a short term of suspension. Petitioner cannot here complain that the Commission failed to give it such lesser penalty for its misconduct.

V

Petitioner seems to contend that, even if its Entertainment license was properly revoked, it should have been allowed to retain its Public Eating license. Here, the revocation was not

based solely on Ms. Beauford's conviction, nor on her conduct as an "entertainer," but on undisputed evidence that, in addition to her appearance on the stage, she alternated as a waitress and, in that capacity, she engaged in obscene conduct. The revocation of the Public Eating license validly rested on that abuse of that license.

The judgment is affirmed.

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS.

KINGSLEY, J.

We concur:

FILES, P.J.

McCLOSKY, J.

APPENDIX II

Los Angeles, Cal. FEB 13 1961, 19

TITLE { [illegible] } No. 54088

PETITION FOR REHEARING DENIED.

CLAY ROBBINS, *Clerk*

APPENDIX III

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

I have this day filed Order APR 16 1961

HEARING DENIED

In re: Dorcy No. 5408

vs.

County of LA

Respectfully,

Clerk

III-1.

APPENDIX IV

BUSINESS LICENSE COMMISSION

COUNTY OF LOS ANGELES

STATE OF CALIFORNIA

In the matter of

DARCLY INC.

Officers of Record:
Clyde L. Wright (deceased), President
Margaret S. Wright, Secretary Treasurer
John S. Andersen, Vice President

Change of Directors - application pending:
Margaret S. Wright, President
Floyd J. Leroy, Vice President
Horace Rhodes, Secretary

DBA
CLYDE'S
13319-21 E. Imperial Highway
Whittier, California

ACCUSATION
NO. 412

As provided in Ordinance 5860 of the County of Los Angeles, you are hereby notified that it is the intention of the Sheriff's Department of the County of

Los Angeles to recommend that the Business License Commission, County of Los Angeles, revoke your Entertainment and Public Eating License.

This intend (sic) is based on the fact that sufficient evidence exists to support such a revocation based on the following facts, information, and belief.

COUNT I

That on or about February 27, 1976, undercover Los Angeles County Deputy Sheriff's, after paying a $1.00 admission, entered the licensed location known as Clyde's located at 13319-21 East Imperial Highway, Whittier (unincorporated area).

Upon seating themselves, deputies observed a female employee, later identified as Deborah Lalydia Beauford and

another unidentified female employee walk onto the stage and begin dancing to recorded music. During the first song, deputies observed Ms. Beauford, who was clad in a bikini outfit, remove the bottom half of her bikini, dance and lay with her back on the stage, raise her legs above her head and spread the lips of her vagina with her hands, then roll the lips of her vagina with her hands in a circular motion. During the second song, deputies observed Ms. Beauford, who was then nude move close to customers sitting at the edge of the stage. At one point, Ms. Beauford encircled her thighs around an unknown customer's head and rubbed her thighs against his face and shoulders. The customer then placed his face approximately one to two inches from Ms. Beauford's vagina and extended

his tongue while she continued to gyrate her pelvic area. During a third song, Ms. Beauford was observed to squat before an unknown customer, spread and roll the lips of her vagina and state "Its pretty ain't it baby?" or words to that effect to which the customer was heard to reply "Yeah, looks like good eating" or words to that effect (/s/PI Mayers, 2/2/77). Ms Beauford then danced to two more songs during which she repeated the action that she did during the first song which actions were described previously herein. After leaving the stage, Ms. Beauford was observed to go to the serving area of the bar then approach a customer standing near the stage, back into his crotch area and then gyrate her buttocks.

While Ms. Beauford was dancing, deputies also observed a male employee, later identified as Larry Steve Johansen, who identified himself as manager, enter and exit the location's office area, observe Ms. Beauford dancing and direct employees in their duties.

As a result of the above activities, deputies subsequently arrested Ms. Beauford for violation of California Penal Code Section 311.6, Participating in Obscene Live Conduct, and Mr. Johansen for violation of California Penal Code Section 311.6, Permitting Obscene Live Conduct.

Further, that on or about October 6, 1976, in the Municipal Court of Whittier Judicial District, Ms. Beauford was found guilty as charged by court trial.

The charges against Mr. Johansen were dismissed in the interest of justice based on findings as to Ms. Beauford and pursuant to plea bargaining.

Therefore, pursuant to Los Angeles County Ordinance 5860, Section 91.9(b)(1), your Entertainment License should be revoked and pursuant to Los Angeles County Ordinance 5860, Sections 92(b), 92(c), 92(e), 92(f), 92(j) and 92(k), your Public Eating License should be revoked.

Refer to L.A.S.D. File No. 476-03880-0494-133

Refer to Whittier Municipal Court Docket M-108884

Within 10 days after service upon you of this accusation, you may file with the Business License Commission, County of Los Angeles, 1165 Hall of Records,

320 West Temple, Los Angeles, California 90012, one or more notices of defense as provided in Ordinance 5860, Section 135.4 of the County of Los Angeles, in which you may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the Business License Commission may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that you cannot identify the transaction or prepare your defense.

(4) Admit the accusation in whole or in part.

Failure to file such notice shall constitute an admission of the truth of the allegations of the accusation and a

waiver of respondents rights to a hearing.

The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address.

The undersigned is a public officer acting in his official capacity as a Deputy Sheriff, and says that the foregoing accusation is true of his information and belief and as to those matters he believes them to be true.

DATED this 4th day of November 1976

PETER J. PITCHESS, SHERIFF

By /s/George J. Goociak
George J. Goociak, Lieutenant
Deputy Sheriff

I hereby acknowledge receipt of the foregoing accusation and notice of defense.

Signed: _____

Address: _____

Date: _____

Served by: _____

GV/ma

APPENDIX V

COUNTY OF LOS ANGELES
BUSINESS LICENSE COMMISSION
320 West Temple Street
Room 1165
Los Angeles, California 90012
Telephone 974-7691

COMMISSIONERS:

Bethel Smith
President

Golde M. Benson
Secretary

Arnold E. Mennillo
Stanley Rothman
Edyth C. Koch

February 7, 1977

CERTIFIED MAIL - Return Receipt Requested

Darcly, Inc.
c/o Mr. Kenneth P. Scholtz
Attorney at Law
315 South Beverly Drive, Suite 406
Beverly Hills, California 90212

Gentlemen:

Subject: Accusation No. 412 re Entertainment Class I and Public Eating licenses for CLYDE'S - 13319-21 E. Imperial Hwy., Whittier

At the Business License Commission hearing held on February 2, 1977, the

Commission found Accusation No. 412 to be true and correct. It was then ordered that the entertainment class I and public eating licenses be revoked pursuant to Sections 91.9, 92(b), 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860.

Sincerely yours,

/s/Bethel Smith
Bethel Smith
President

rad

Enclosure - Appeal Procedure

cc: Tax Collector, License Division
Sheriff's License Detail
Sheriff's Counsel
Commission Counsel
Mr. Kenneth P. Scholtz, Attorney

APPENDIX VI

COUNTY OF LOS ANGELES
LICENSE APPEALS BOARD
1165 New Hall of Records
Los Angeles, California 90012
Telephone 628-9211--974-7691

December 28, 1977

CERTIFIED MAIL - Return Receipt
Requested
Darcly, Inc.
dba CLYDE'S
13319-21 East Imperial Highway
Whittier, California

Gentlemen:

Subject: Appeal of BLC's decision of February 2, 1977, revoking entertainment and public eating licenses

This is to advise you that the License Appeals Board has considered the above referenced matter and finds that the appeal is without merit and does, therefore, deny said appeal.

Sincerely yours,

LICENSE APPEALS BOARD
Charles v. Tackett,
Chairman

/s/Patricia Ann Hunter
Patricia Ann Hunter
Secretary-Reporter

rad

cc: Chairman, License Appeals Board
Tax Collector, Field Collections
Commission Counsel
Sheriff's License Detail
Mr. Kenneth P. Scholtz, Attorney

APPENDIX VII

KENNETH P. SCHOLTZ
315 South Beverly Drive
Suite 406
Beverly Hills, California 90212
(213) 556-3428

Attorney for Petitioner

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DARCLY, INC., a California corporation, dba CLYDE'S,

Petitioner,

vs.

COUNTY OF LOS ANGELES, THE BUSINESS LICENSE COMMISSION OF THE COUNTY OF LOS ANGELES AND THE LICENSE APPEALS BOARD OF THE COUNTY OF LOS ANGELES,

Respondents.

PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES,

Real Party in Interest.

C 226 906
PETITION FOR WRIT OF MANDATE
AND FOR STAY ORDER

Petitioner Darcly, Inc., alleges that:

1. At all times mentioned herein, petitioner was and now is a corporation duly formed and existing under the laws of the State of California and was and now is the owner and operator of the premises known as Clyde's, 11319-21 East Imperial Highway, County of Los Angeles.

2. At all times mentioned herein, respondent County of Los Angeles, was and now is a County formed and existing pursuant to charter under the laws of the State of California.

3. At all times mentioned herein, respondent Business License Commission, was a board duly formed and existing pursuant to Ordinance No. 5860 of the County of Los Angeles, having authority

to grant, deny, suspend or revoke various business licenses issued by respondent County, including but not limited to those licenses issued to petitioner.

4. At all times mentioned herein, respondent License Appeals Board of the County of Los Angeles, was a board duly formed and existing pursuant to Ordinance 5860 of the County of Los Angeles, having aurthority to hear and rule on appeals from decisions of respondent Business License Commission.

5. At all times mentioned herein, real party in interest Peter J. Pitchess, was and now is the duly elected and acting sheriff of the County of Los Angeles.

6. At all times mentioned herein, petitioner Darcly, Inc., has been the holder of the following business

licenses issued by respondent County of Los Angeles for the premises knows as Clyde's: Entertainment License, Class I and Public Eating.

7. On or about November 4, 1976, real party in interest Peter J. Pitchess, filed an accusation with respondent Business License Commission seeking revocation of petitioner's entertainment and public eating license based on the grounds that an entertainer employed at Clyde's had engaged in various acts which led to her arrest and conviction for violation of Section 311.6 of the California Penal Code. A true and correct copy of said accusation is attached hereto as "Exhibit I" and incorporated herein by reference.

8. On or about November 19, 1976, petitioner filed a notice of defense to

the accusation. A true and correct copy of said notice of defense is attached hereto as "Exhibit II" and incorporated herein by reference.

9. On or about January 12, 1977, a hearing was held on the accusation before respondent Business License Commission. A true and correct copy of the reporter's transcript of said hearing is attahced hereto as "Exhibit III" and incorporated herein by reference. At the conclusion of the hearing the matter was taken under submission.

10. On or about February 2, 1977, respondent Business License Commission met in executive session to consider said accusation, at the conclusion of which it voted to revoke petitioner's license by a vote of three to two. A true and correct copy of the reporter's

transcript of said session is attached hereto as "Exhibit IV" and incorporated herein by reference.

11. On or about February 7, 1977, respondent Business License Commission gave written notice of its order to petitioner. A true and correct copy of said order is attched hereto as "Exhibit V" and incorporated herein by reference.

12. On or about February 15, 1977, petitioner duly filed a notice of appeal to respondent License Appeals Board.

13. On or about December 28, 1977, respondent License Appeals Board denied a hearing to petitioner. A true and correct copy of the notice of denial, which was made without written or oral argument, is attached hereto as "Exhibit VI" and incorporated herein by reference.

14. Grounds exist for the granting of this petition pursuant to Section 1094.5 of the Code of Civil Procedure in that petitioner did not have a fair trial, respondents did not proceed in the manner required by law, the findings are not supported by the evidence and the decision is not supported by the findings in that:

(a) Sections 91.9, 92(b), 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860 is unconstitutional on its face and as applied herein in that they violate due process by arbitrarily and unreasonably restricting participation in a lawful business and by imposing an unconstitutional prior restraint on the exercise of free speech.

(b) Sections 91.9(b), 92(b), 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860 are unconstitutionally vague and uncertain on their face and as applied herein.

(c) Respondent Business License Commission failed to make specific findings and conclusions as required by law.

(d) Respondent Business License Commission committed a prejudicial abuse of discretion and imposed an excessively severe penalty when it ordered revocation of petitioner's license based upon a single violation of law by an employee.

(e) There was not substantial evidence to support the findings that petitioner violated Sections 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860.

15. Petitioner has exhausted all administrative remedies available to it and has no plain, speedy and adequate remedy at law other than to seek judicial review by way of this petition.

WHEREFORE petitioner prays for relief as follows:

1. For a judgment setting aside the decisions of respondents and for a peremptory writ of mandate directing respondents to reinstate and reissue petitioner's entertainment and public eating licenses, or to take such other action as the court deems appropriate;

2. For an order staying enforcement of respondent's decisions pending final determination of this petition;

3. For costs of suit;

4. For reasonable attorneys fees;

5. For such other and further relief as the court deems proper.

Dated: January 6, 1978

KENNETH P. SCHOLTZ
Attorney for Petitioner

APPENDIX VIII

FILED: May 8, 1978
John J. Corcoran, County Clerk
By Dennis Fisher, Deputy

JOHN H. LARSON, County Counsel
PATRICK T. MEYERS, Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, CA 90012
(213) 974-1943

Attorneys for Respondents

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

DARCLY, INC., a California Corporation, dba CLYDE'S,

Petitioner,

v.

COUNTY OF LOS ANGELES, et al.,

Respondents.

CASE NO. C 226906
JUDGMENT DENYING PETITION FOR WRIT OF MANDATE

This matter came regularly before this Court on March 28, 1978, for hear-

ing. Kenneth P. Scholtz appeared as attorney for petitioner and John H. Larson, County Counsel, by Patrick T. Meyers, Deputy County Counsel, appeared as attorneys for respondents. The record of the administrative proceedings have been received into evidence and examined by the Count, no additional evidence having been received by the Court, arguments having been presented, and theCourt having made findings of fact and conclusions of law, which have been signed and filed,

IT IS ORDERED THAT:

1. The petition filed in this action for a peremptory writ of mandamus is denied; and

2. The alternative writ of mandamus in this action is discharged; and

3. The stay order issued in this action is dissolved as of the expiration of the time during which an appeal may be taken, or upon filing of notice of appeal, whichever is first; and

4. Respondents shall recover its costs in this action, in the amount of $_____.

DATED: May 8, 1978

/s/George M. Dell
GEORGE M. DELL
Judge of the Superior Court

Judgment entered on _____, 19___, in the Judgment Book, Volume No. _____, page _____.

JOHN J. CORCORAN
County Clerk and Clerk of the Superior Court of California, County of Los Angeles

By_____
Deputy Clerk

FILED: May 8, 1978
John J. Corcoran, County Clerk
By Dennis Fisher, Deputy

JOHN H. LARSON, County Counsel
PATRICK T. MEYERS, Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, CA 90012
(213) 974-1943

Attorneys for Respondents

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

DARCLY, INC., a California Corporation, dba CLYDE'S,

Petitioner,

v.

COUNTY OF LOS ANGELES, et al.,

Respondents.

CASE NO. C 226906
FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter came regularly before this Court on March 28, 1978, for hear-

ing. Kenneth P. Scholtz appeared as attorney for petitioner and John H. Larson, County Counsel, by Patrick T., Meyers, Deputy County Counsel, appeared as attorneys for respondents. The record of the administrative proceedings having been received into evidence and examined by the Court, no additional evidence having been received by the court, arguments having been presented, and the matter having been submitted for decision, the Court makes the following:

FINDINGS OF FACT

1. Petitioner DARCLY, INC. was and now is a corporation, duly formed and existing under the laws of the State of California, which owns and operates the premises known as Clyde's, 11319-21 East Imperial Highway, County of Los Angeles,

2. Respondent COUNTY OF LOS ANGELES

(hereinafter COUNTY) was and now is a County formed and existing pursuant to charter under the laws of the State of California. Respondent BUSINESS LICENSE COMMISSION (hereinafter COMMISSION) was and now is a commission formed and existing to administer Los Angeles County Ordinance No. 5860, the License Ordinance which empowers said Commission to grant, deny, suspend or revoke various business licenses issued by Respondent County. Respondent LICENSE APPEALS BOARD (hereinafter BOARD) was and now is a Board duly formed and existing to review on administrative appeal the decisions of Respondent Commission under said ordinance. Real party in interest PETER J. PITCHESS was

and now is the duly elected and acting Sheriff of the County of Los Angeles.

3. Petitioner held Entertainment Class I and public eating licenses granted by Respondent Commission pursuant to Los Angeles County Ordinance No. 5860.

4. On or about November 9, 1976, real party in interest, PETER J. PITCHESS, as Sheriff of the County of Los Angeles filed Accusation No. 412 with Respondent Commission, to revoke petitioner's entertainment license pursuant to Section 91.9(b)(1) of Ordinance No. 5860 and petitioner's public eating license pursuant to Sections 91(b), 92(c), 92(e), 92(f), 9(j) and 92(k) of said ordinance, and on or about November 19, 1976, petitioner

filed a notice of defense to said accusation.

5. On or about January 12, 1977, a hearing was held before Respondent Commission to determine whether petitioner's entertainment and public eating licenses should be revoked or otherwise disciplined, and following said hearing, the matter was taken under submission by Respondent Commission.

6. On or about February 2, 1977, Respondent Commission found amended Accusation No. 412 to be true and correct and revoked petitioner's entertainment license upon the grounds set forth in Section 91.9(b)(1) of Ordinance No. 5860 and its public eating license upon the grounds set forth in Sections 92(b), 92(c), 92(e), 92(f), 92(j) and 92(k) of said ordinance.

7. On or about February 15, 1977, petitioner filed an administrative appeal with Respondent Board, and on or about December 28, 1977, the appeal was denied by Respondent Board, exhausting petitioner's administrative remedy.

8. Petitioner received a full and fair hearing and had ample opportunity to make a full presentation of his case at the adminisrative level.

9. The evidence presented against the petitioner was not controverted in any essential respect.

10. The factual allegations of amended Accusation No. 412, incorporated by reference herein, were found to be true and correct, which finding is supported by the weight of the evidence and constitutes a ground for revocation of petitioner's entertainment license

under Section 91.9(b)(1) of Ordinance No. 5860: to-wit, a conviction of an employee of the license for violation of a penal statute arising from acts performed in the exercise of rights granted by the license.

11. The factual allegations of amended Accusation No. 412, incorporated by reference herein, were found to be true and correct, which finding is supported by the weight of the evidence and constitutes grounds for revocation of petitioner's public eating license under the following subsections of Section 92 of Ordinance No. 5860: to-wit, (b) violation by employee of the licensee of a penal statute relating to the permitted activity under the license; (c) conviction of employee of the license of a crime involving moral

turpitude; (e) behavior of employee of the licensee evidencing bad moral character and intemperate habits; (f) commission by employee of the licensee of an unlawful act while conducting a licensed business; (j) conduct of the licensed business by employee contrary to the peace, health, safety and the general welfare of the public; and (k) demonstration of unfitness to be trusted with the privileges granted by said license.

12. Petitioner failed to request Respondent Commission to make written findings of fact pursuant to Section 135.15.5 of Ordinance No. 5860, and, in light of the virtually uncontroverted evidence against it, written findings of fact are reasonably and necessarily implied by the finding of the truth and

accuracy of amended Accusation No. 412 and decision of Respondent Commission and any deficiency therein worked no prejudice to petitioner.

13. Petitioner failed to make a sufficient showing that the procedure and decision of Respondents Commission and Board were invalid and should be set aside.

14. No abuse of discretion of Respondent Commission has been shown in imposing the penalty of revocation.

From these facts the Court makes the following.

CONCLUSIONS OF LAW

1. Section 91.9(b)(1) of Los Angeles County Ordinance No. 5860 is a valid and constitutional ground upon which to base

revocation of petitioner's entertainment license.

2. Sections 92(b), 92(c), 92(e), 92(f), 92(j) and 92(k) of Los Angeles County Ordinance No. 5860 are valid and constitutional grounds upon which to base revocation of petitioner's public eating license.

3. In the administrative proceedings, Respondents

a. Did not proceed without or in excess of their jurisdiction;

b. Granted petitioner a fair trial; and

c. Proceeded in the manner required by law.

4. Respondents' decisions in those proceedings were supported by the findings.

5. Respondent Commission's findings were supported by the weight of the evidence.

6. Judgment should be entered:

a. Denying the petition for a peremptory writ of administrative mandamus;

b. Discharging the alternative writ of administrative mandamus issued in this action;

c. Dissolving the stay order issued in this action as specified in the judgment herein; and

d. Awarding respondents its costs in this action.

To the extent that any finding of fact should have been denominated a conclusion of law, and vice-versa, it is hereby declared that any finding may be deemed to be a conclusion of law, and

any conclusion of law may be deemed to be a finding of fact.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 8, 1978

/s/George M. Dell
GEORGE M. DELL
Judge of the Superior Court

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA, County of Los Angeles

NANCY G. MAR states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 648 Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 12th day of April, 19 78, I served the attached PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon Plaintiff by depositing a copy thereof, enclosed in a sealed envelope

with postage thereon fully prepaid, in a United States mail box in Los Angeles, California, addressed as follows:

MR. KENNETH P. SCHOLTZ, ESQ.
315 South Beverly Drive
Suite 406
Beverly Hills, CA 90212

and that the person on whom said service was made has his office at a place where there is a delivery service by United States mail, and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Los Angeles, California

Dated: April 12, 1978

/s/Nancy G. Mar

Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS
CLERK

No. 81-85
IN THE

Supreme Court of the United States

October Term, 1981.

DARCLY, INC., a California Corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES, THE BUSINESS LICENSE COMMISSION OF THE COUNTY OF LOS ANGELES, THE LICENSE APPEALS BOARD OF THE COUNTY OF LOS ANGELES AND PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT.

JOHN H. LARSON,
County Counsel,
PATRICK T. MEYERS,
Deputy County Counsel,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1852,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented for Review.

1. Whether the conviction of the licensee's employee for obscene live conduct in the furtherance of its licensed business is a constitutional and reasonable basis for revocation of its entertainment and public eating licenses?

2. Whether petitioner's claim of facial overbreadth in Section 91.9 of Los Angeles County Ordinance No. 5860 is real and substantial?

3. Whether the petitioner was afforded appropriate procedural safeguards at the administrative revocation hearing?

4. Whether there were adequate grounds for the revocation of the petitioner's public eating license?

TABLE OF CONTENTS

Page

Questions Presented for Review i
Introductory Matter 1
Statutes and Ordinances Involved 2
California Penal Code Section 311.6 2
Los Angeles County Ordinance No. 5860 2
Sec. 16. Illegal Occupations 2
Sec. 82.7. (10,545 8-11-72) Grounds for Denial, Activities Which May Involve Free Speech 2
Sec. 91 (9962 3-20-70) Right to Revoke 3
Sec. 135.15.5 (9848 9-16-69) Findings 3
Statement of the Case and Material Facts 3
Argument 10

I.

The Revocation of the Petitioner's Entertainment License for Its Employee's Violation of a Penal Statute Was a Reasonable and Constitutional Exercise of the County's Police Power 10

II.

Petitioner's Claim of Facial Overbreadth Is Not Real and Substantial 18

III.

Petitioner Was Afforded But Failed to Avail Itself of its Procedural Rights 18

IV.

There Were Adequate Grounds Alleged and Proven to Support the Revocation of Petitioners Public Eating License 19

V.

Conclusion 20

INDEX TO APPENDICES

		Page
Appendix 1.	Notice of Defense ..... App. p.	1
Appendix 2.	Petition for Writ of Mandate and for Stay Order	2
Appendix 3.	Notice	6
Appendix 4.	Judgment Dismissing Action	7
Appendix 5.	Findings of Fact, Conclusions of Law and Order Denying Motion for Preliminary Injunction and Granting Motion to Dismiss	8

TABLE OF AUTHORITIES

Cases — Page

Alexander v. City of St. Paul, 227 N.W.2d 370 (Minn., 1975) 15, 16

Arenstein v. State Bd. of Pharmacy, 265 Cal.App.2d 179, 71 Cal.Rptr. 357 (1968) 12

Austin v. Municipal Court, 89 Cal.App.3d 269, 152 Cal.Rptr. 400 (1979) 11

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 18

California v. LaRue, 409 U.S. 109 (1974) 10, 11

City of Portland v. Derrington, 253 Or. 289, 451 P.2d 111, cert. denied 396 U.S. 901 (1969) 10, 11

City of Seattle v. Bittner, 81 Wash.2d 747, 505 P.2d 126 (1973) 15, 17

Cornell v. Reilly, 127 Cal.App.2d 178, 273 P.2d 572 (1954) 13

Crownover v. Musick, 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497 (1973), cert. denied sub. nom. Reynolds v. Sacramento County, Owen v. Musick, 415 U.S. 931 (1974) 10, 11, 17

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 10

Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) 16

Konigsberg v. State Bar, 366 U.S. 36 (1961) 17

Mack v. Dept. of Alcoholic Bev. Control, 178 Cal.App.2d 149, 2 Cal.Rptr. 629 (1960) 13

Martin v. Alcoholic Beverage, etc. Appeals Bd., 152 Cal.App.2d 259, 341 P.2d 291 (1959) 15

Natco Theatres, Inc. v. Ratner, 463 F.Supp. 1124 (S.D.N.Y. 1979) 16, 17

106 Forsyth Corp. v. Bishop, 362 F.Supp. 1389 (M.D. Ga. 1972), aff'd. 482 F.2d 281 (5th Cir. 1973), cert. denied 422 U.S. 1044 (1973) 17

Page

People v. Beauford, 79 Cal.App.3d, Supp. 1, 145 Cal.Rptr. 173 (1978) 6, 11

People v. Conway, 103 Cal.App.3d Supp. 11, 162 Cal.Rptr. 877 (1979) 11

Perrine v. Municipal Court, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971) 13, 14, 15, 17

S & F Corp. v. Bilandic, 62 Ill.App.3d 193, 378 N.E. 2d 1137 (App.Ct. 1978) 13

Schad v. Mt. Ephraim, ... U.S. ...., 68 L.Ed.2d 671 (1981) 18

7978 Corporation v. Pitchess, 41 Cal.App.3d 42, 115 Cal.Rptr. 746 (1974) 10, 12

United States v. O'Brien, 391 U.S. 367 (1968) 17

Young v. American Mini Theatres, 427 U.S. 50 (1976) 10

Yuclan Enterprises, Inc. v. Arre, 488 F.Supp. 820 (D. Haw. 1980) 16

Constitution

United States Constitution, First Amendment 8, 10, 11, 13, 14, 16

Statutes — Page

California Code of Civil Procedure, Sec. 1094.5 7
California Penal Code, Sec. 311.6 ..... 2, 4, 11
Los Angeles County Ordinance No. 5860, Sec. 16 ... . 2, 12
Los Angeles County Ordinance No. 5860, Sec. 82.7 ..... 2, 12, 14
Los Angeles County Ordinance No. 5860, Sec. 91 ... . 3, 12
Los Angeles County Ordinance No. 5860, Sec. 91.9 ..... i, 18
Los Angeles County Ordinance No. 5860, Sec. 91.9(b)(1) 4, 7, 12, 15, 16
Los Angeles County Ordinance No. 5860, Sec. 92(b) 7
Los Angeles County Ordinance No. 5860, Sec. 92(c) 7
Los Angeles County Ordinance No. 5860, Sec. 92(e) 7
Los Angeles County Ordinance No. 5860, Sec. 92(f) 7
Los Angeles County Ordinance No. 5860, Sec. 92(j) 7
Los Angeles County Ordinance No. 5860, Sec. 92(k) 7
Los Angeles County Ordinance No. 5860, Sec. 135.15.5 ..... 3, 7
Los Angeles County Ordinance No. 5260, Sec. 3244 2
United States Code, Title 28, Sec. 2201 7
United States Code, Title 28, Sec. 2202 7
United States Code, Title 42, Sec. 1983 7

No. 81-85

IN THE

Supreme Court of the United States

October Term, 1981.

DARCLY, INC., a California Corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES, THE BUSINESS LICENSE COMMISSION OF THE COUNTY OF LOS ANGELES, THE LICENSE APPEALS BOARD OF THE COUNTY OF LOS ANGELES AND PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT.

INTRODUCTORY MATTER.

The topics headed "Parties to this Proceeding", "Opinions of Courts and Administrative Agencies Below", and "The Grounds on which Jurisdiction of this Court is Invoked" in the Petition for Writ of Certiorari in the instant matter are incorporated by this reference in this Brief in Opposition.

The item headed "The Ordinances Which Are Involved in This Case" and the Appendices to the Petition for Writ of Certiorari are incorporated by this reference in this brief and supplemented as hereafter indicated.

STATUTES AND ORDINANCES INVOLVED.

California Penal Code Section 311.6.

Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token, is guilty of a misdemeanor.

Los Angeles County Ordinance No. 5860

Sec. 16. Illegal Occupations.

A license granted pursuant to this ordinance does not permit any occupation or activity of any kind which is prohibited by this, or any other ordinance, or by any state statute, law, rule, order or regulation.

Sec. 82.7. (10,545 8-11-72) Grounds for Denial. Activities which may Involve Free Speech.

The following shall constitute grounds for denial of a license for a bookstore, exhibition, traveling show, motion picture theatre, sound or advertising vehicle, model studio, picture arcade, entertainment as defined in Article 1 of Chapter XVII, Outdoor Festivals or Growth Centers. This section does not apply to security guards as provided for in Section 3244:

(a) The building, structure, equipment or location of such business does not comply with or fails to meet all of the health, zoning, fire and safety requirements or standards of all the laws of the State of California or ordinances of the County of Los Angeles applicable to such business operation.

(b) The applicant, his employee, agent or manager has knowingly made any false, misleading or fraudulent statement of material fact in the application for a license or in any report or record required to be filed with the Tax Collector.

Sec. 91 (9962 3-20-70) Right to Revoke.

Every license granted under this ordinance or any section thereof is granted and accepted by all parties with the express understanding that the Commission may hold a public hearing, notice of the time and place of which shall be given to the licensee, and that if, after such hearing, the Commission finds that any grounds of revocation exist, the Commission may revoke or suspend such license, and that if the facts or conditions constituting the grounds of revocation are an immediate threat to the public peace, health, or safety, the Commission, pending such hearing, may suspend such license for not more than sixty days.

Sec. 135.15.5 (9848 9-16-69) Findings.

Written findings of fact are not required unless requested at the hearing by a party thereto. The findings if any, may be stated in the language of the pleadings or by reference thereto.

STATEMENT OF THE CASE AND MATERIAL FACTS.

Petitioner DARCLY, INC. (hereinafter DARCLY), a California corporation, owns and operates a business establishment known as Clyde's bar in the County of Los Angeles. The petitioner had obtained licenses from Respondent County of Los Angeles (hereinafter COUNTY) to present entertainment and to serve food, as required by Los Angeles County Ordinance No. 5860.

Said Ordinance is administered by Respondent BUSINESS LICENSE COMMISSION (hereinafter COMMIS-

SION), which hears and determines thereunder whether or not to grant applications for licenses as well as whether or not to suspend or revoke licenses currently held by licensees. Further, under said ordinance, Respondent LICENSE APPEALS BOARD (hereinafter BOARD) considers the appeals of applicants for licenses or licensees from adverse determinations of Respondent COMMISSION, typically by reviewing the administrative record of the hearing(s) below. The provisions of Los Angeles County Ordinance No. 5860 are enforced by Respondent PETER J. PITCHESS, Sheriff of the County of Los Angeles (hereinafter SHERIFF).

At a noticed hearing on February 2, 1977 of Accusation No. 412, which accusation is set forth in Appendix IV of the petition, Respondent SHERIFF had the burden of proving the allegations therein and supporting his recommendation to Respondent COMMISSION that petitioner's entertainment and public eating licenses should be revoked. The factual grounds for the sought revocation of petitioner's entertainment license were that its employee, Deborah Lalydia Beauford, while acting as a performer and waitress at its licensed premises on February 27, 1976, had engaged in a variety of conduct, which led to her arrest and the arrest of Larry Steve Johansen, identified as the manager of Clyde's bar, for violating California Penal Code Section 311.6. Miss Beauford was eventually convicted of the charge. Under Section 91.9(b)(1) of Los Angeles County Ordinance No. 5860, set forth at pp. 5-7 of the petition, an entertainment license is subject to revocation if the licensee, his employee, agent or manager has been convicted in a court of competent jurisdiction of any violation of a statute while performing any act(s) pursuant to the entertainment license. Essentially the same factual grounds were urged by Respondent SHERIFF as a basis for the sought revocation of the petitioner's public eating license. The petitioner had

filed a notice of defense to Accusation No. 412, as required by Ordinance No. 5860. The petitioner's notice of defense is set forth in Appendix 1 herein.

The evidence presented by Respondent SHERIFF to Respondent COMMISSION consisted of the testimony of deputy sheriff Russell L. Petrie, who observed a number of the performances and other activities in Clyde's bar, and documentary evidence of Miss Beauford's conviction. Deputy sheriff Petrie testified that he observed Miss Beauford, after removing her bra and bikini bottom, lie down on the stage with her legs extended apart over her head and manipulate and massage her vaginal area for some time so that the lips of her vagina opened and closed. Getting up from the floor, she gyrated her hips and performed "bumps and grinds" for the audience. With her torso facing upward and supporting herself with her hands and feet, she moved in this manner with a crab-like motion, until, reaching a patron at the periphery of the stage, she placed her legs and thighs over his shoulders and brought her vagina within inches of his face while gyrating her pelvic area. She would also squat in close proximity of a patron while manipulating the lips of her vagina. Miss Beauford similarly disported herself during her other sessions on the stage. After she had left the stage and dressed herself in her bikini bottom and brief top, deputy sheriff Petrie observed her place her buttocks in the proximity of a patron's crotch and gyrate her hips while serving the patrons as a waitress (State court clerk's transcript, pp. 43-48). The cross-examination of deputy sheriff Petrie merely reiterated and amplified in greater detail the nature and extent of Miss Beauford's conduct (State court clerk's transcript, pp. 53-61.)

Periodically deputy sheriff Petrie observed petitioner's employee Larry Steve Johansen, the manager of Clyde's bar, watch some of Miss Beauford's conduct on stage, direct

various employees in their duties, and move about the premises. (State court clerk's transcript, pp. 51-52). Deputy sheriff Petrie made the foregoing observations over a period of approximately an hour.

No representative, officer, or employee of the petitioner, apart from its attorney, appeared or testified at the hearing before Respondent COMMISSION. The petitioner's attorney testified briefly that he was Miss Beauford's attorney in the criminal proceeding arising from her arrest, and that her conviction was under appeal. (State court clerk's transcript, pp. 72-73). Apart from this testimony and cross-examination of deputy sheriff Petrie, no other evidence was offered on behalf of the petitioner. No findings were requested by the petitioner or its attorney. Miss Beauford's conviction was later upheld on appeal. *People v. Beauford*, 79 Cal.App.3d Supp.1, 145 Cal.Rptr. 173 (1978).

On February 2, 1977, Respondent COMMISSION found accusation No. 412, as amended, to be true and correct and revoked the petitioner's entertainment and public eating licenses. The petitioner filed an administrative appeal with Respondent BOARD on February 15, 1977. Respondent BOARD reviewed the record of the administrative proceedings before Respondent COMMISSION and denied the administrative appeal on December 28, 1977.

The petitioner thereafter brought an action in the California Superior Court to set aside the revocation orders of Respondent COMMISSION. The petition is set forth in Appendix 2 herein. Following hearing, the petition for a writ of administrative mandamus was denied on May 8, 1978. The Superior Court found that the petitioner had received a full and fair hearing at the administrative level; that the evidence presented against the petitioner was not controverted in any essential respect; and that the petitioner had failed to request written findings of fact as provided in

Section 135.15.5 of Los Angeles County Ordinance No. 5860. Therefore, the administrative finding that accusation No. 412, as amended, was true and correct sufficed under the circumstances. The Superior Court further found that this administrative finding was supported by the weight of the evidence and constituted grounds for revocation of the petitioner's entertainment and public eating licenses. Section 91.9(b)(1) of Los Angeles County Ordinance No. 5860 is a valid and constitutional ground upon which to base revocation of the petitioner's entertainment license, the Superior Court concluded, as are Sections 92(b), 92(c), 92(e), 92(f), 92(j) and 92(k) of said ordinance valid and constitutional grounds upon which to base revocation of petitioner's public eating license. The Superior Court's Judgment Denying Petition for Writ of Mandate and its Findings of Fact and Conclusions of Law are set forth in Appendix VIII to the petition.

The petitioner filed its notice of appeal from the Superior Court judgment on July 6, 1978. Having thereafter unsuccessfully petitioned the California Court of Appeals, Second Appellate District, for a writ of supersedeas and stay of the revocation orders, the petitioner sought a hearing in the California Supreme Court with regard to said denial, which also was denied on August 16, 1978. The stay of revocation orders permitted under California Code of Civil Procedure section 1094.5 dissolved on July 26, 1978. Meanwhile, after separate administrative proceedings instituted by the California Department of Alcoholic Beverage Control, the revocation of the petitioner's on-sale beer license became final (Appendix 3).

During the pendency of its appeal in the instant case, the petitioner sought federal court intervention by bringing an action for injunctive and declaratory relief under 42 U.S.C. §1983 and 28 U.S.C. §§2201, 2202 in the United States

District Court for the Central District of California. *Darcly, Inc. v. Peter J. Pitchess, etc.*, U.S.D.C. Case No. CV 78-4333-MRP. The petitioner essentially argued that various provisions of Los Angeles County Ordinance No. 5860 are unconstitutional under the First Amendment and that thus enforcement of said ordinance as to its business operations should be enjoined. Following hearing of cross-motions for preliminary injunction and dismissal, the United States District Court dismissed the action on January 15, 1978, finding that federal intervention was inappropriate in the absence of any showing that the challenged ordinance provisions were patently or flagrantly unconstitutional. The District Court's Judgment and Findings of Fact, Conclusions of Law and Order Denying Motion for Preliminary Injunction and Granting Motion to Dismiss are set forth in Appendix 4 herein.

In the instant case, California Court of Appeal affirmed the Superior Court judgment on January 26, 1981. The appellate court rejected the petitioner's contention that revocation of a license is indistinguishable from denial of an application for a license and that nude conduct in bars is tantamount to the sale of books for purposes of the First Amendment. The appellate court concluded that Los Angeles Ordinance No. 5860 clearly sets forth standards for revocation that are constitutionally adequate. The opinion of the California Court of Appeal is set forth in Appendix 1 to the petition. The Court of Appeal denied the petitioner's request for rehearing on February 13, 1981 and the California Supreme Court denied petitioner's request for hearing on April 16, 1981.

Notwithstanding any suggestions to the contrary in petitioner's brief or other documents presented to this Court, petitioner has not ceased its operations. With the exception of a brief lapse in its operations when it sought intervention

by the federal district court, and, despite its lack of an alcoholic beverage license, the petitioner has largely remained in operation during the foregoing proceedings.

ARGUMENT.

I.

The Revocation of the Petitioner's Entertainment License for Its Employee's Violation of a Penal Statute Was a Reasonable and Constitutional Exercise of the County's Police Power.

This Court has expressed the view in various cases involving state regulation of adult entertainment establishments that nude conduct occupies a low rank in the hierarchy of protected expression. *California v. LaRue*, 409 U.S. 109, 117 (1974). *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976). The California Supreme Court shares this view of nude conduct in business establishments. *Crownover v. Musick*, 9 Cal.3d 405, 425-428, 107 Cal.Rptr. 681, 509 P.2d 497 (1973), *cert. denied sub. nom. Reynolds v. Sacramento County, Owen v. Musick*, 415 U.S. 931 (1974). The police power of Respondent COUNTY clearly permits regulation related to nude conduct in bars or public eating places. *Crownover v. Musick, supra*, 9 Cal.3d at 426. See also *7978 Corporation v. Pitchess*, 41 Cal.App.3d 42, 46-47, 115 Cal.Rptr. 746 (1974). Notwithstanding their misgivings about the degree of protection to which such conduct may be entitled, federal and state courts have often balanced the governmental interest in the regulation of various activities with the prospect that such regulation may impinge on First Amendment guarantees. *Young v. American Mini Theatres, supra*, 427 U.S. at 78-82 (Powell, J., concurring) *Crownover v. Musick, supra*, 9 Cal.3d at 419. *City of Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, 113, *cert. denied* 396 U.S. 901 (1969). Nude conduct in bars or public eating places has been found not to implicate First Amendment guarantees at all in some instances. *City of Portland*

v. Derrington, supra. The scope of permissible state or local regulation significantly increases as such activity encompasses acts which may violate valid penal statutes. *California v. LaRue, supra.*

The instant petition involves nude conduct by petitioner's employee which was not even within the shadow area between activity protected and unprotected under the First Amendment. The nude conduct of Miss Beauford was adjudged obscene and her conviction for violating California Penal Code Section 311.6 was sustained on appeal. *People v. Beauford,* 79 Cal.App.3d Supp. 1, 145 Cal.Rptr. 173 (1977). It is noteworthy that in another criminal proceeding arising from comparable conduct at petitioner's business establishment, such conduct was found not to be protected by the First Amendment under the authority of *Crownover v. Musick, supra. Austin v. Municipal Court,* 89 Cal.App.3d 269, 272, 152 Cal.Rptr. 400 (1979). See also *People v. Conway,* 103 Cal.App.3d Supp. 11, 162 Cal.Rptr. 877 (1979).

Under the supposition that the petitioner or others could present legitimate entertainment pursuant to an entertainment license, however, the petitioner argues that revocation of its entertainment license for its employee's unlawful conduct constitutes a prior restraint on its freedom of speech. Pursuing this contention to its endpoint, an entertainment license, once granted, could never be revoked or suspended by a licensing authority, even when unlawful conduct takes place pursuant to the license. Because arguably legitimate entertainment might be presented one day, the doctrine of prior restraint, petitioner theorizes, would preclude any disciplinary action which would have an impact on that prospect. The upshot would be that licensing by local governments of activities which may involve free speech considerations would be at an end. The petitioner's theory

of prior restraint has been rejected by each court which has considered it.

Licensing schemes such as Los Angeles County Ordinance No. 5860 have been enacted for the protection of the public health, safety, morals, and general welfare. *7978 Corporation v. Pitchess, supra,* 41 Cal.App.3d at 46-47. The lawful exercise of licensed activities is essential to the fulfillment of these objectives. Section 16 of Ordinance No. 5860 emphasizes the imperative that a license not be exercised in violation of the law. The grounds for denial of a license which may involve free speech are few but substantial. Section 82.7 of Ordinance No. 5860. Once granted, however, a license is necessarily subject to revocation if it is used to violate the law. Section 91 of Ordinance No. 5860. This is basic to any licensing scheme. A commonly recognized ground for the revocation of virtually any license is a violation of law in the exercise of a licensed activity.

Section 91.9(b)(1) of Ordinance No. 5860 provides for the suspension or revocation of an entertainment license where a licensee, his manager or employee has been convicted in a court of competent jurisdiction of violating any statute or ordinance while performing any act in the exercise of the license activity. The threshold requirement of a court conviction assures a rigorous determination as to any alleged violation(s) of law prior to the institution of any administrative proceeding. The potential class of persons subject to this ground of revocation is reasonably confined to proven criminal offenders affiliated with the licensed activity. California administrative bodies often rely on a prior judicial determination of the basis for criminal or civil liability. *Arenstein v. State Bd. of Pharmacy*, 265 Cal.App.2d 179, 71 Cal.Rptr 357 (1968). The critical determination of whether the proven violation was done in the furtherance of the licensed activity is determined by Respondent COM-

MISSION, subject to review by Respondent BOARD and the state trial and appellate courts. It is well settled in California that improper or unlawful acts of a licensee's employee are a basis for administrative discipline against the licensee. *Id. Mack v. Dept. of Alcoholic Bev. Control*, 178 Cal.App.2d 149, 154, 2 Cal.Rptr. 629 (1960). *Cornell v. Reilly*, 127 Cal.App.2d 178, 186-187, 273 P.2d 572 (1954). The principle that a licensee has the responsibility to see to it that its license is not used in violation of the law is followed in other jurisdictions, *i.e.* see *S & F Corp. v. Bilandic*, 62 Ill.App.3d 193, 198, 378 N.E. 2d 1137 (App.Ct. 1978).

Petitioner seeks to avoid this principle by theorizing that because the obscene live conduct of its employee was entertainment, purportedly, its license is insulated from revocation because entertainment is protected expression under Ordinance No. 5860. Because the petitioner was entitled to present entertainment under its entertainment license, it follows from petitioner's reasoning that it may present obscene live conduct in the guise of entertainment under the licensing scheme with impunity.

The purported entertainment ceased to be protected under the First Amendment as well as under Ordinance No. 5860 when it became a crime, however. Whatever the degree of protection to which nude dancing is entitled under the First Amendment, obscene live conduct is entitled to no protection at all. The prospect that the petitioner could or would have presented lawful entertainment cannot uplift what was presented to the status of protected expression. See Opinion of the California Court of Appeal in Appendix I to the Petition, pp. I-5 through I-6.

The petitioner nonetheless argues that it is on the same footing with an applicant for a bookstore license who is denied the license because of a prior conviction. *Perrine*

v. Municipal Court, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), however, involved completely different considerations than the instant case. Perrine had been in the bookstore business for several years when an ordinance was enacted requiring licensing of bookstores but effectively setting no standards governing the issuance of such licenses. Among the several grounds for denial was any conviction suffered by the applicant, his employees or associates within the previous five years for any of a variety of sex crimes or crimes of violence against the person. Perrine had been convicted of two such offenses and was denied a license as well as prosecuted for not having a license under the new ordinance. The ordinance was held unconstitutional as a prior restraint on First Amendment guarantees because it set no adequate standards for issuing licenses. It was also held unconstitutional to deny an applicant a bookstore license because he had suffered a prior conviction. *Perrine v. Municipal Court, supra*, 5 Cal.3d at 659-660.

The absence of any reasonable relation between the qualifications to run a bookstore and any past convictions of Perrine was emphasized as sufficient reason to invalidate the ordinance irrespective of First Amendment considerations *Id.* 5 Cal.3d at 663. An applicant who is denied the opportunity to engage in an occupation on the basis of some past misconduct may be deprived of a livelihood altogether. Yet the misconduct may be remote and unrelated to the occupation. Section 82.7 of Ordinance No. 5860 now reflects the teaching of *Perrine* with respect to applications for licenses which may involve free speech. Although petitioner contends that there are no published cases in California dealing with the questions raised in its petition (Petition, pp. 20-21), it has asserted that the *Perrine* case is controlling and that there is no distinction between the denial of an application for a license and the revocation of a license.

There is a clear distinction between proceedings involving the revocation of an existing license and proceedings involving the denial of a license application, however. *Martin v. Alcoholic Beverage, etc. Appeals Bd., #1* 52 Cal.App.2d 259, 264, 341 P.2d 291 (1959) Revocation or suspension involves situations in which a licensee or its employee may have abused or otherwise failed to adhere to requirements or conditions of its license. The relation between the licensed activity and any misconduct thereunder is virtually assured by the limiting application of Section 91.9(b)(1) of Ordinance No. 5860 solely to convictions arising from acts taken pursuant to the license sought to be revoked or suspended. *Perrine v. Municipal Court, supra,* is inapposite.

Likewise, *City of Seattle v. Bittner,* 81 Wash.2d 747, 505 P.2d 126 (1973) and *Alexander v. City of St. Paul,* 227 N.W.2d 370 (Minn., 1975) are of dubious relevance to the instant case. The *Bittner* case involved city denials of applications to operate a motion picture theater and to renew a motion picture theater license. It is apparent that the City of Seattle ordinance treated application procedures for license renewal applications the same as initial applications for a license. *City of Seattle v. Bittner, supra,* 505 P.2d at 127-128. The *Alexander* case ostensibly involved the revocation of a motion picture theater license, but an examination of the facts of the case suggests that it was more in the nature of a denial following a reconsideration. While the initial application was pending, the applicant was permitted to operate the motion picture theater without a license. Twenty-nine days before the license was granted, a ticket taker was convicted of violating an obscenity ordinance. Less than a month after the license was granted, the City of St. Paul sought to rescind the motion picture theater license on the basis of the ticket taker's conviction. Although the *Alexander* opinion refers to the terms "revocation" and

"rescission" in an interchangeable sense, the circumstances strongly suggest that the City of St. Paul sought to rescind its action granting the license because grounds existed to deny the license under the St. Paul ordinance at the time the license was granted.

The federal cases cited by the petitioner in support of the proposition that revocation of an entertainment license for prior convictions constitutes an invalid prior restraint also concern bookstores or motion picture theaters exclusively. Such activities have generally been accorded the greatest protection under the First Amendment because matter which is printed or depicted on a screen has qualities of permanence and communicative potential which exceed other forms of expression, particularly conduct. Although *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) does generally appear to equate denial with revocation of a bookstore license under the doctrine of prior restraint, it is significant that the ground of revocation or suspension for violating other provisions of the Peoria adult use ordinance was upheld to the extent that such other provisions were constitutional. *Id.* 619 F.2d at 1219, n. 42, and 1220 Section 91.9(b)(1) of Ordinance No. 5860 comparably necessitates that the conviction suffered relate to acts in the performance of the license activity. Further, the grounds for revocation or suspension that were held unconstitutional as prior restraints in *Genusa* did not require any express connection with exercise of the licensed activity. This distinguishes the broad provisions of the Peoria ordinance held unconstitutional from the provisions held constitutional, as well as from Section 91.9(b)(1) of Ordinance No. 5860.

Natco Theatres, Inc. v. Ratner, 463 F.Supp. 1124 (S.D.N.Y. 1979) and *Yuclan Enterprises, Inc. v. Arre*, 488 F.Supp. 820 (D. Haw. 1980) deal solely with licensing schemes for motion picture theaters. The *Natco Theatres*

opinion lumps together its discussion of denial and revocation of motion picture theatre licenses, relying chiefly on the *Perrine*, *Bittner*, and *Alexander* cases, which essentially involved denials, rather than revocations, of licenses based on prior convictions. *Natco Theaters v. Ratner*, *supra*, 463 F.Supp. at 1129-1130. Indeed, the New York City licensing scheme by its terms appears to be concerned chiefly with applicants who had previously held licenses or been in operation. *Id.*, 463 F.Supp. at 1128. Notwithstanding these cases, there is authority for the contrary proposition that revocation of a motion picture theater license for past violations of state obscenity and other statutes does not violate the constitutional prohibition against prior restraints. *106 Forsyth Corp. v. Bishop*, 362 F.Supp. 1389, 1396-1397 (M.D. Ga. 1972), *aff'd.* 482 F.2d 281 (5th Cir. 1973), *cert. denied* 422 U.S. 1044 (1973).

But such differences in federal decisions with regard to motion picture theater licenses should not necessitate the granting of the petition for writ of certiorari in the instant case. As previously emphasized the obscene live conduct of the petitioner's employee presents different considerations than the broad scope of protection afforded motion picture films and reading matter. Nude conduct is clearly subject to regulation, even though there may be an incidental burden on expression, where justified by valid governmental interests. *Crownover v. Musick*, *supra*, 9 Cal. 3d at 419, citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968) and *Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1961). Under the circumstances of the instant case, as applied to the petitioner, the revocation of its entertainment license for its employee's conduct does not significantly burden protected expression, while it does serve the important governmental interests of fostering public morals and general welfare.

II.

Petitioner's Claim of Facial Overbreadth Is Not Real and Substantial.

This Court has cautioned that facial overbreadth adjudication has a limited function, particularly where conduct, is involved, which, while arguably expressive, may run afoul of valid criminal laws. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Any claimed overbreadth must be real and substantial. *Id.* Unlike the adult bookstore operator in *Schad v. Mt. Ephraim*, ... U.S. ..., 68 L.Ed.2d 671 (1981), the petitioner cannot reasonably contend that protected expression of others is comparably impaired by Section 91.9 of Ordinance No. 5860. Whereas the Mt. Ephraim zoning ordinance excluded all live entertainment from that borough, Section 91.9 essentially admonishes licensees to conduct their licensed business in a lawful manner. The prospect of curtailment or even chilling protected expression by the existence of various grounds for suspension or revocation of licenses is not a real and substantial threat. The examples of threats perceived by the petitioner are facile and dubious. Although petitioner has not clearly articulated the facial overbreadth claimed to inhere in Section 91.9 of Ordinance No. 5860, Respondents submit that any overbreadth may be readily cured as it arises by appropriate narrowing constructions.

III.

Petitioner Was Afforded But Failed to Avail Itself of Its Procedural Rights.

The petitioner has cited no meaningful authority for the proposition that it was deprived of constitutionally required safeguards. The burden of instituting administrative proceedings to revoke the petitioner's entertainment and public eating licenses was undertaken by Respondent SHERIFF,

who had the burden of proof as to the grounds for revocation. The petitioner filed its notice of defense and availed itself of its right to a hearing. The petitioner had the right to request the issuance of subpoenas to compel the attendance of witnesses and production of documents, to be present at the hearing through its corporate directors or officers, to be represented by counsel, to call and examine witnesses under oath, to introduce exhibits, and generally to rebut and adduce evidence. No one appeared or testified at the hearing other than the petitioner's attorney. No findings of fact were requested by the petitioner or his attorney. There was no lack of procedural safeguards available to the petitioner at any stage of the administrative, trial court and appellate stages of this case.

IV.

There Were Adequate Grounds Alleged and Proven to Support the Revocation of Petitioners Public Eating License.

The undisputed testimony of deputy sheriff Petrie supported the allegations of the accusation and showed that the licensee's employee engaged in the alleged conduct both as a waitress and as a purported entertainer. The petitioner is essentially raising evidentiary questions in an effort to challenge the factual findings below. Both the trial and appellate court below found that the revocation of the petitioner's public eating license was validly based on abuse of that license.

V.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

JOHN H. LARSON,
County Counsel,
By PATRICK T. MEYERS,
Deputy County Counsel,
Attorneys for Respondents.

APPENDIX 1.

Notice of Defense.

Business License Commission, County of Los Angeles, State of California.

In the Matter of Darcly Inc., Officers of Record: Clyde L. Wright (deceased), President, Margaret S. Wright, Secretary Treasurer, John S. Andersen, Vice President, Change of Directors — application pending: Margaret S. Wright, President, Floyd J. Leroy, Vice President, Horace Rhodes, Secretary, dba Clyde's 13319-21 E. Imperial Highway, Whittier, California. Accusation No. 412.

Pursuant to Los Angeles County Ordinance 5860, Section 135, et seq., respondent DarCly, Inc. hereby files this Notice of Defense and requests a hearing to contest the charges contained in said accusation, and by way of further defense states that:

1. The Accusation fails to state factual grounds upon which the Commission may proceed.

2. The conviction of Deborah Beauford has been appealed and is not yet final. Thus, it does not provide grounds upon which the Commission may proceed.

3. Since the Accusation involves conduct potentially protected by the First Amendment, revocation may not be premised upon Ordinance 5860, Sections 92(b), 92(c), 92(f), 92(j) and 92(k).

Dated: November 19, 1976

/s/ Kenneth P. Scholtz
KENNETH P. SCHOLTZ
Attorney for Respondent.

APPENDIX 2.

Petition for Writ of Mandate and for Stay Order.

Superior Court of the State of California for the County of Los Angeles.

Darcly, Inc., a California corporation, dba Clyde's, Petitioner, vs. County of Los Angeles, the Business License Commission of the County of Los Angeles and the License Appeals Board of the County of Los Angeles, Respondents. Peter J. Pitchess, Sheriff of the County of Los Angeles, Real Party in Interest. C226906.

Filed: January 17, 1978.

Petitioner Darcly, Inc., alleges that:

1. At all times mentioned herein, petitioner was and now is a corporation duly formed and existing under the laws of the State of California and was and now is the owner and operator of the premises known as Clyde's, 11319-21 East Imperial Highway, County of Los Angeles.

2. At all times mentioned herein, respondent County of Los Angeles, was and now is a County formed and existing pursuant to charter under the laws of the State of California.

3. At all times mentioned herein, respondent Business License Commission, was a board duly formed and existing pursuant to Ordinance No. 5860 of the County of Los Angeles, having authority to grant, deny, suspend or revoke various business licenses issued by respondent County, including but not limited to those licenses issued to petitioner.

4. At all times mentioned herein, respondent License Appeals Board of the County of Los Angeles, was a board duly formed and existing pursuant to Ordinance 5860 of the County of Los Angeles, having authority to hear and rule

on appeals from decisions of respondent Business License Commission.

5. At all times mentioned herein, real party in interest Peter J. Pitchess, was and now is the duly elected and acting sheriff of the County of Los Angeles.

6. At all times mentioned herein, petitioner Darcly, Inc., has been the holder of the following business licenses issued by respondent County of Los Angeles for the premises known as Clyde's: Entertainment License, Class I and Public Eating.

7. On or about November 4, 1976, real party in interest Peter J. Pitchess, filed an accusation with respondent Business License Commission seeking revocation of petitioner's entertainment and public eating license based on the grounds that an entertainer employed at Clyde's had engaged in various acts which led to her arrest and conviction for violation of Section 311.6 of the California Penal Code. A true and correct copy of said accusation is attached hereto as "Exhibit I" and incorporated herein by reference.

8. On or about November 19, 1976, petitioner filed a notice of defense to the accusation. A true and correct copy of said notice of defense is attached hereto as "Exhibit II" and incorporated herein by reference.

9. On or about January 12, 1977, a hearing was held on the accusation before respondent Business License Commission. A true and correct copy of the reporter's transcript of said hearing is attached hereto as "Exhibit III" and incorporated herein by reference. At the conclusion of the hearing the matter was taken under submission.

10. On or about February 2, 1977, respondent Business License Commission met in executive session to consider said accusation, at the conclusion of which it voted to revoke petitioner's license by a vote of three to two. A true and

correct copy of the reporter's transcript of said session is attached hereto as "Exhibit IV" and incorporated herein by reference.

11. On or about February 7, 1977, respondent Business License Commission gave written notice of its order to petitioner. A true and correct copy of said order is attached hereto as "Exhibit V" and incorporated herein by reference.

12. On or about February 15, 1977, petitioner duly filed a notice of appeal to respondent License Appeals Board.

13. On or about December 28, 1977, respondent License Appeals Board denied a hearing to petitioner. A true and correct copy of the notice of denial, which was made without written or oral argument, is attached hereto as "Exhibit VI" and incorporated herein by reference.

14. Grounds exist for the granting of this petition pursuant to Section 1094.5 of the Code of Civil Procedure in that petitioner did not have a fair trial, respondents did not proceed in the manner required by law, the findings are not supported by the evidence and the decision is not supported by the findings in that:

(a) Sections 91.9, 92(b), 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860 is unconstitutional on its face and as applied herein in that they violate due process by arbitrarily and unreasonably restricting participation in a lawful business and by imposing an unconstitutional prior restraint on the exercise of free speech.

(b) Sections 91.9(b), 92(b), 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860 are unconstitutionally vague and uncertain on their face and as applied herein.

(c) Respondent Business License Commission failed to make specific findings and conclusions as required by law.

(d) Respondent Business License Commission committed a prejudicial abuse of discretion and imposed an excessively severe penalty when it ordered revocation of petitioner's license based upon a single violation of law by an employee.

(e) There was no substantial evidence to support the findings that petitioner violated Sections 92(c), 92(e), 92(f) and 92(k) of Los Angeles County Ordinance 5860.

15. Petitioner has exhausted all administrative remedies available to it and has no plain, speedy and adequate remedy at law other than to seek judicial review by way of this petition.

WHEREFORE petitioner prays for relief as follows:

1. For a judgment setting aside the decisions of respondents and for a peremptory writ of mandate directing respondents to reinstate and reissue petitioner's entertainment and public eating licenses, or to take such other action as the court deems appropriate;

2. For an order staying enforcement of respondent's decisions pending final determination of this petition;

3. For costs of suit;

4. For reasonable attorneys fees;

5. For such other and further relief as the court deems proper.

Dated: January 6, 1978

/s/ Kenneth P. Scholtz
KENNETH P. SCHOLTZ
Attorney for Petitioner.

APPENDIX 3.

Notice.

Department of Alcoholic Beverage Control of the State of California.

In the Matter of the Accusation Against, Darcly, Inc., Clyde's 13319-21 Imperial Hwy., Whittier, on-sale beer license, Respondent under the Alcoholic Beverage Control Act. File 3839. Reg. 8225.

The Alcoholic Beverage Control Appeals Board having affirmed the decision of the Department of Alcoholic Beverage Control in the above matter and the Supreme Court having denied hearing therein, the decision of the Department dated June 8, 1978, is now final.

A representative of the Department will call on you on or after September 4, 1979, to pick up the license certificate.

Sacramento, California

Dated: August 23, 1979

C. E. Cameron, Jr.

C. E. CAMERON, JR.
CHIEF COUNSEL

APPENDIX 4.

Judgment Dismissing Action.

United States District Court Central District of California.

Darcly, Inc., a California corporation, Plaintiff, v. Peter J. Pitchess, Sheriff of the County of Los Angeles, Defendant. Case No. CV 78-4333 MRP.

Filed: January 15, 1979.

On December 11, 1978, Defendant's motion to dismiss this action was heard by the Court in the courtroom of the Honorable Mariana R. Pfaelzer. In accordance with the Findings of Fact and Conclusions of Law filed herein on December 29, 1978.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above entitled action shall be and hereby is dismissed, with each party to bear their own costs of suit incurred.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, a copy of this Judgment on counsel for the parties in this matter.

DATED: January 12, 1979

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge.

APPENDIX 5.

Findings of Fact, Conclusions of Law and Order Denying Motion for Preliminary Injunction and Granting Motion to Dismiss.

United States District Court Central District of California.

Darcly, Inc., a California corporation, Plaintiff, v. Peter J. Pitchess, etc., Defendant. Case No. CV 78-4333 MRP.

Filed: December 29, 1978.

Plaintiff's motion for a preliminary injunction and Defendant's motion to dismiss this action were heard on December 11, 1978. Evidence having been presented and considered by the Court, the matter having been fully argued and submitted, and proof being made to the satisfaction of the Court, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff, DARCLY, INC., is a California corporation, which has owned and operated a business establishment known as "Clyde's" at 13319-21 East Imperial Highway in the unincorporated area of the County of Los Angeles.

2. The defendant, PETER J. PITCHESS, is the Sheriff of the County of Los Angeles, whose law enforcement responsibilities include enforcement of Los Angeles County Ordinance No. 5860.

3. In addition to an on-sale beer license issued by the State of California Department of Alcholic Beverage Control, the plaintiff has held various licenses under Los Angeles County Ordinance No. 5860, including entertainment and public eating licenses. In accordance with the provisions of said ordinance, an accusation was filed on or about November 9, 1976, by the defendant against the plaintiff rec-

ommending revocation of the plaintiff's entertainment and public eating licenses. Following an administrative adjudication pursuant to Ordinance No. 5860, the accusation was found true and the plaintiff's entertainment and public eating licenses were revoked on or about February 2, 1977, by administrative order of the Business License Commission of the County of Los Angeles.

4. The License Appeal Board of the Couunty of Los Angeles denied plaintiff's administrative appeal on December 28, 1977. Thereafter, on or about January 12, 1978, the plaintiff brought an administrative mandamus proceeding in the Los Angeles County Superior Court to set aside and to stay the administrative revocation order. On or about May 8, 1978, the Superior Court denied the petition for writ of administrative mandamus and dissolved the stay order as of the expiration of the time during which an appeal might be taken, or upon filing of notice of appeal, whichever occurred first.

5. On or about July 6, 1978, the plaintiff filed a notice of appeal to the Court of Appeal of the State of California thereby extending the stay of the administrative revocation order twenty (20) days to July 26, 1978, pursuant to California Code of Civil Procedure 1094.5.

6. On or about July 26, 1978, plaintiff's petition for a writ of supersedeas and stay order of the administrative revocation order, filed July 17, 1978, with the Court of Appeal of the State of California, was denied.

7. On or about August 1, 1978, the plaintiff filed a petition with the Supreme Court of the State of California for hearing from the order denying its petition for writ of supersedeas and stay order and for a temporary stay order. On or about August 16, 1978, the California Supreme Court denied that petition.

8. Plaintiff's appeal of the Superior Court judgment denying its petition for peremptory writ of mandamus to set aside the administrative revocation order is pending in the Court of Appeal of the State of California.

9. The plaintiff elected to close its business establishment on or about October 26, 1978, following an inquiry by a Los Angeles County deputy sheriff as to its intentions with respect to the expiration and subsequent state appellate court denials of a stay order of the administrative order revoking the plaintiff's entertainment and public eating licenses.

10. The plaintiff made no showing of irreparable injury or harm. The plaintiff's showing as to this issue consisted essentially of its president's opinion that although the business establishment can remain open and operating, it would not be as profitable without the continuance of activities subject to the administrative revocation order.

11. The plaintiff did not make a showing that the challenged ordinance is patently or flagrantly unconstitutional.

12. The plaintiff did not show bad faith, harassment, or any other unusual circumstance on the part of the defendant that would call for equitable relief or that would otherwise justify federal intervention in the pending appellate proceedings in the Court of Appeal of the State of California.

CONCLUSIONS OF LAW

1. Federal intervention prior to the completion of state appellate proceedings is contrary to the doctrines of federalism, comity and equitable restraint. *Younger v. Harris*, 402 U.S. 37 (1971).

2. Federal injunctive relief is not available absent a showing of great and immediate, irreparable injury. *Huffman v. Pursue*, 420 U.S. 592, 601 (1974).

3. A Federal Court should not act to restrain the state law enforcement process absent extraordinary circumstances such as bad faith, harassment by state officials, or flagrant and patent unconstitutionality of a state law. Id at 602.

4. The plaintiff is not entitled to a contemporaneous federal forum for its federal claim, and thus must first exhaust its state appellate remedies before seeking relief from this Court. Id at 606.

Based on the above stated findings of fact and conclusions of law,

IT IS ORDERED that the motion of plaintiff for preliminary injunction is denied.

IT IS FURTHER ORDERED that defendant's motion to dismiss the above entitled action is granted.

DATED:

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge